Of Slander

(1) To entitle to a recovery in Slander the charges must be false & malicious. If the charges are true, no recovery can be had, however malicious: and if they are false & unconnected with malice, they are not actionable.

False, as in its usual acceptation, means nothing more than that it is untrue.

Malice in Law, is not merely the same as is understood by the word in common conversation. It is difficult to convey the exact import of the word as here used. The person speaking must act Mala animo. It is not necessary to constitute it that he should entertain any personal hatred to the person slandered. For if a man was to kill his friend for the purpose of procuring his money, it would still be considered as a malicious act. Nor on the other hand is all dislike or anger, malice in this sense of the word. If a man should put another to death, under certain circumstances, it would only be manslaughter; malice not being implied. — As to the motive, which actuates to the offence, it is immaterial, provided it is a vile one. So stories told thro' mere wantonness are such as the law will consider malicious. But if it was merely thro' mistake, the law will not consider it as malicious; for malice is not predicable of the mind, but of the heart. See McNally in full upon this subject beginning at p. 546.

If the words complained of, prima facie import malice, the law will presume it, and it is incumbent upon the Deft to rebut the presumption.

There are two kinds of slander. The one is when the words themselves are actionable. The other is when the words are not in themselves actionable, but become so by reason of some special damages accruing therefrom.

Words that are actionable in themselves entitle to damages, whether any damages have actually arisen therefrom or not. By this kind are charges of Theft, Forgery &c. Damages may be proved however if the party chuses.

Words that are not actionable in themselves; do not entitle to a recovery unless some special damages can be proved.

As to the rules of distinction — One is, that words, which if true, would subject a person to ~~an indictment~~ an indictment for a felony; are actionable in themselves — of this kind are charges of Forgery, Theft &c. — But charges of lying, of being a rogue &c not being ~~indictable~~ infamous, are not actionable in themselves.

But all charges which impute crimes are not in themselves actionable, provided the punishment does not exceed fines. — As another rule — All charges, tho' the punishment does not exceed fines; yet if it goes to charge a person with an infamous offence, are actionable. As a charge of robbing an orchard &c. Common sense must be our guide in applying this rule. And Judge Ch — concludes that it will universally be found to accord with the decisions in the books. The offence of not

burying in woolen is finable; yet it is not actionable to charge, or not so burying.

But if the charge is even so scandalous, & is not subject to punishment, it is not actionable in itself. A charge however that is not infamous, if indictable, is in all cases actionable in itself. (2)

Altho the charge which you may fix upon a man is actionable, yet if it is qualified in such a manner as not to render it an indictable offence, it is not in itself actionable. viz As if a A should say that "B was a thief, for he had robbed his orchard".

If words have a tendency to destroy a Mans livelihood, they are actionable. As to call a physician a quack in the employ (1) 1 Rolle 42. 34. 35. 62.

Another class of cases are those when a man is charged of having acted improperly in an office. As to say that a Justice of the peace is a mumm shall, for he gave a ridiculous decision in such a case. 2 D Ray 1389. 1 Strange 617. 4 Co 16. Such are actionable in themselves

Charging a man with having a contagious disease which would go to exclude him from Society, is actionable in itself. And on case has gone so far as to say that it was actionable to charge a man with having the itch. 1 Rolle 43. 4. (3)

As to the words which are not prima facie actionable, but in consequence of some damage arising therefrom. Any words whatever, that were spoken maliciously, and produce damage to the person to whom they were applied are actionable. In these cases the action is brought for special damage, & it must be averred & proved.

There are certain maxims respecting slander that it is necessary to take notice of. In the books two contradictory maxims are to be found: One is that courts will bend to bring in malice; & the other that they will excuse if possible. These rules were probably established when slander was very prevalent, and when it was very rare. But according to the present ideas they must be taken according to the common import of the words; without any warping. Even cant phrases, which are generally understood to convey certain ideas, are actionable. As when it had been common to say that men who had stolen from others cellars were book binders; and a man charged another, in a passion of him; that he had been a binding books.

It is frequently said that anger, & passion excuses slander But this is a mistake; when they are excused it is only upon the ground that the words were not actionable. As charging a man with being a lyer, & a rascal &c. And if when crimes are charged upon a man by one who is in a passion, there is no provocation for the passion, it will be no palliation; but if there was, it would go in mitigation of damages.

It will often happen that in the same declaration are contained, actionable & unactionable charges. The rule in these cases is, that if these charges were made at different times, then the unactionable words may be demurred to; but if they were all spoken at the same time, the declaration is completely good; for those that are

(1) There is a case reported in Salkeld, where a charge of begetting a child, was decided not to be slanderous, for the begetting of a bastard, as the case may be, will subject one to imprisonment; for if such child become expensive to the parish, the father ~~may~~ must answer that expence, or suffer imprisonment. The decision however is consistent with the rule, for the charge was not that the child had been an expence to the parish, nor was it so stated in the plaintiffs declaration, consequently it was bad on demurrer. Cowt 137. Salk 694.

(2) To to call a Lawyer a knave; to charge him with having revealed his clients secrets; to say he is no Lawyer; or no man of one than the devil, is actionable. Rolle 523. 4 Co Ch 515. 3 Ch 123. 2 Vent 28: 1 Rolle 547: 2 Wills 59. Generally any charges against a lawyer that charges him with ignorance in his profession is actionable. Co Ch 382: 1 Sid 327: 1 Com 182.

It is necessary in these cases that the Lawyer should be a practising one, & that he should prove himself such on trial, not a mere record one.

Charging a trader with being a ~~be~~ bankrupt, or bankrupt knave, that he will be a bankrupt within no ~~years~~ or three days, or the like ~~is~~ is actionable. 4 Co 19a. 2 Sha 762.

To also to charge a trader with cheating his customers is ~~actionable~~. 2 Lev 62. 3 Ray 1480: 3 Bur 1688. — The pltff must in this case state in his declaration, by laying a colloquium, otherwise that the words were spoken of him as a trader, or in the capacity of one, or respecting his trade. Salk 694. ~~3 Ray 1480. 3 Burr 1688~~ Salk 696. 1169 3 Ray 696 7 Ray 62. 169: 8 Mod 398.

But it is not necessary to lay by a colloquium, when from the words themselves it is inferable that they were spoken of a trader, in his capacity of a trader, or that they were spoken of his ~~trade~~ trade, ~~or in the capacity of one, or respecting his trade. Salk 694~~ as to call a trader a bankrupt, the word bankrupt being predicable of none but traders. So to advise a traders customers not to trade with him because he is a cheat. 2 Lev 62. 9. But he must aver in his declaration that he was a trader when the words were spoken, for it is necessary that they ~~were~~ should be spoken of a present trader to make them slanderous. Co Ch 98. Co 19 222.

(3) There are only three disorders which the Law deems it scandalous to report that a person labours under viz The plague, the Leprosy & the Lues Venea.

(1) To charge a man with a crime after he has been pardoned is slander; for the pardon in Just. of law renders a criminal a new man. 7 Ray 23. Hob 81.

So is it to charge a man with a crime after he has been acquitted. But these cases must stand upon some other ground than danger of punishment; for by acquittal all danger is done away. Owen 150.

There has been a similar decision in Con for it has been determined that a charge of a crime barred by the Stat of Limitation is slanderous.

If the charge is of a crime that could not have been committed, it is not slander; as to charge a man with murdering one who is still alive. 2 Cro 6. Bul 5. If the Deft should state him to be alive it might be demurred to. If the Deft does not state it the Deft must in his Plea state specially; that it might still be given in evidence in mitigation of damages. In Con the Defts action would be overruled by exhibiting it in evidence under the general issue.

Tho' the punishment of a crime is in the alternative, yet if it may be corporal it is slanderous. Ro Ch 215. Salk 694. 2 Roll 407.

It has been held slander in Con to charge a Clergyman with being a liar. In Ky it is slander to say that the preacher lies. Allen 531: 1 Com 101: 7 Mass 60.

With regard to mechanics it may be laid down as a general rule, that any charge, which has a tendency to injure them in their profession is slanderous. Sta 098. 2 Roll 491.

not actionable will go to prove in what temper of mind the others were spoken.

There are various ways of communicating slander, as by asking questions &c. But this is still slander. Tho' formerly they were not so considered. — And indeed the law is now so rigid that there is no manner to be considered, of, in which a man uses his tongue, in which he can avoid an action.

~~But signs are not predicable, Cases &c.~~

If a man only reports a piece of slander, he is in many cases liable.

It was formerly held that altho' the words spoken imported a crime, yet if the charge was general, without limiting it to any particular offence, it was not actionable. To say for instance that a man was a traitor, was not actionable; but to limit it by charging some particular treasonable act was. But this rule is altogether obsolete. — Such words raise a presumption that the man intended an actionable charge; and it is incumbent upon him to rebut it.

Charging a man with having committed an indictable offence, and of being punished for it; if not true, is actionable. 12 Co 124. Cro Jac 246

If an epithet charges a man with being in the habit of committing indictable offences, it is actionable; if merely having an inclination to commit them, it is not actionable. To say for instance that a man was a thieving vassal is actionable; but it is not actionable to say that a man is a thievish vassal. 1 Roll 47. Cro Eli 318. (1)

It was also once held that it was no crime to upbraid, provided a person gave up his author; but it is otherwise now. And a man is liable to an action provided he reports, with a similar disposition of mind, that would subject him if he originated it. Bull N P beginning. Cro Jac 91.

Things may often be said with impunity in a Court of Justice, that would be actionable any where else. But the law will not suffer this privilege to be perverted into a cloak to slander maliciously with. If for instance a lawyer should go altogether out of the case, in order to charge a man with a crime; he would be liable. ~~upon the~~ 1 Roll 33. Cro Jac 90. 1 Vent 276.

When a man says that one out of ~~another~~ several persons has been guilty of an offence, which if false would support an action of slander: there is a dicta of a judge, which says that the law will presume he meant the man, who first brings his action. Judge R — does not know why they might not join & support an action. 1 Roll 81

Slander to support an action must be spoken in language that was understood. It would not therefore be slander to charge a man of a crime in French, before a number of ignorant people.

Words must in fact be understood, or not actionable. But if a degree of malice is mixed with them they are.

It is worthy of remark that legal ideas have been such at different times that there is no charge which ~~would~~ cannot be excused by authority. Caution should therefore be used in relying upon them.

Some further authorities applicable to the preceding rules.
2 Will 300. (2 Dun 473) 3 Will 59) 8 Wall 11 p)

Of the Action for Slander.

This action must always be a several action and not joint as in the case of assault & battery. But if there has been a plot entered into by a number for the purpose of slandering another; then a joint action may be supported. 6 J. 647. in nature of a ct. of conspiracy.

If special damages are sued for no other can be proved, than what is stated in the declaration. And this rule holds whether the words are actionable, but not when they are not actionable. 14 J 666.

It is a very common thing to lay distinct counts, than may all be comprised in the same declaration. As if the Plff was at one time charged of being a thief, & at another of being a robber &c.

If the charges in the different counts are part actionable, & part are not; and the Deft pleads not guilty generally; & the jury return a general verdict; this is a sufficient reason to arrest the judgment. But if the jury specify that it was for the actionable counts that they gave damages, the declaration will be thereby cured. —
But if the words were all spoken at one time, and contained in one count, the verdict altho' general, will still be good: and the charges which are not actionable in this case, are not superfluous, for they go to show the temper of mind. 10 Coke Osborns case.

If the Deft did not speak the words, or did not speak them maliciously, then the proper plea is not guilty. If they were true, then it by the Deft pleads specially on record. But in Cir. the plea in this case is also not guilty. (1) For the following law it was determined that in all cases, a justification must be specially pleaded. ~~If your justification rests upon the truth of certain facts, then you must plead it specially, and not guilty, and plead it.~~ 14 J 200.

Other charges, that ~~than~~ those contained in the declaration may be proved, in order to show the temper of mind under which the Deft acted; but no recovery can be had upon any other than those contained in the declaration. Nor can the Deft prove that the Plff has been guilty of any other acts than those contained in the declaration in order to show that the Plff was not damaged, or in no considerable degree by them. — But the Deft may prove that he did not originate those charges which are produced, in order to show the temper of mind.

When the action is for damages generally, the jury give what they think the Plff has been & may be damnified: and if ~~any~~ any further damages should accrue, in consequence of such charges, however great, yet the Plff cannot recover any thing further.

But if the action was for special damages, then, as the jury only pretend to give a compensation for what has already arisen, if any other damages should arise, the Plff might maintain a new action therefor. The Statute of limitations does not run against special damages for slander. 5 Ch 193.

Of the Declaration. This begins by stating that the Plff is a man of good moral character, & never has been suspected of a crime. But this must is mere form, and may be dispensed with: and is not necessary. Then it goes on to state that the Deft in the

Sending it to the Press that it may be published, is a publication, tho' it is not printed. Just 201. Lep 500.

Singing a libelous song is a publication 5 Bac 2666.

But to repeat part of a libel in merriment, has been decided not to be a publication Mor 627. The repetition however must have been without malice.

The sending a libel to a person of whom written is a sufficient publication to ground a criminal prosecution upon, but not a civil one. Pop 139. Hob 62. 215: 12 Co 35: 1 Mod 58.

Of Words actionable When Written.

There has been but few decisions concerning words of this class. It has however been decided that any words tending to render a man ridiculous, will if published support an action. 2 Will 403; 3 Bac 492.

One of the Judges held in that case, that to write of a merchant that he was a rogue or a rascal was actionable. Lep lays down this rule; that any thing which has a tendency to disturb the domestic tranquility of another is actionable, as to libel a mans children. Lep has confounded the public & private right. The action in such a case would clearly lie for the public offence; it is also as clear that none would lie in favour of the individual for the civil injury; and this is warranted by the case from which Lep inferred the rule he laid down. Lep 505: 2 Mod 89.

It has also been decided that to write of a man that he is a swindler is actionable. 2 H Bl 531. Gemp 788.

The public offence & the civil injury of a libel is considered as repeated by every subsequent stage of the publication; & each action for the repetition of the publication lies in the "venue" of its publication. 1 Ze 571. 647. 1 Wills 178. Whatever pains the libeller may have used to avoid the law, as using only the initials or the consonants of the libeller's name, yet if the designation clearly appears, the libel is still actionable. 3 Bac 493: 1 Haw 194: 2 Bl 490 Lep 500.

Libel sine scriptis

Any Defamatory signs which have a tendency to excite resentment, or Ridicule, are actionable; as falling within this kind or species of slander both as a public & a private injury. 5 Co 125: 3 Blk 491.

In an action for this kind of slander it is necessary to show always the application of the libel by innuendoes & averments, & special damages must be stated & proved or it will fail. 3 Blk 125. Lep 511.

Scandalum Magnatum

By Com law we have a Stat Enacting, that if any one shall have the audacity to slander a Court of Justice, or any Magistrate, Court Court, or Justice, respecting their Judicial proceedings therein, the offender shall after due conviction be punished by fine, imprisonment, disfranchisement, or banishment at the discretion of the Court, by which the offender is convicted.

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(1) Though the writing may not convey any slander
any person yet it may be indictable for its tending
to vitiate public tendency & corrupt the morals
of the people. Esp 588.

In the same season publications levelled against the
established religion have been held to be libellous. Ib

In the like manner any public reflection on
the administration of justice is libellous. Esp 588.

(1) The exceptions to the rule, that actionable words are presumptively malicious arise in those cases where the slanderous words have been confidentially spoken, under a necessarily confiding by way of information or advice; or where there is an confiding by a person who wishes to ~~have an~~ give a friend, ~~because of the slander~~ his character from a former master. ~~—~~ So also where one advised his friend in engaging not to trade with a certain merchant, because he would soon become a bankrupt. Bul N P 8: 1 Ze 110: 3 Ca K 60: 4 Bur 2422: 4 Co 19.

(1) resentment, & to render the object of it either odious, ridiculous or contemptible. 1 Hawk 193: 2 Blk 150: 3 Bac 490: 4 Tu. 126.

But it is not to be understood that every writing falling within this definition is actionable as a civil injury, for it was framed to answer as a definition of a libel considered as a public offence & every libel being a public offence lays a ground for a public action, & for the civil injury generally in a private action. 3 Bac 492. 8.

The object under this head is to consider it as a civil injury.

It is laid down generally that the same rules apply to slander by words & by libel. This rule must be taken with qualification viz. that the positive rules applying to oral, will generally apply to slander by libel, yet the positive rules applying to written, will not invariably apply to unwritten slander; because the same words if written would be actionable, are not always so when spoken. 3 Will 405: Sha 498: 3 Blk 126.

The same positive rules apply to both kinds of slander when exhibited before a Judge Coram Judice. Rep 505.

The same positive rules apply to both kinds as to giving the truth in evidence when the action on the libel is for the civil injury. Ind 89: 11 Ind 99: 2 Mad 166. Hob 133. 4 Blk 150: 4 Bac 516.

But in a criminal prosecution the truth of a libel will be no justification of the libeller. 3 Wil 125. 6: 5 Co 125. Sha 498. 4 Blk 150.

Of Publication

It is essential to the consideration of a libel that it be published. Nothing is a libel unless it be made public; but what will amount to a publication may frequently be made a question.

It has been decided that the scribner of the composer of a libel is guilty of a publication. Cath 405: 5 Mod 165.

But merely to transcribe a libel is no publication tho it may be evidence of it. 5 Co 89. Holt however says that the transcriber of a libel is guilty of a publication. Lev 419 Holts dictum in this case is not considered as law.

Composing a libel originally is publishing it, tho' the composer himself does not reduce it to writing. So to willfully read a libel in the presence of others is a publishing, provided the person delivering it knows the contents. 5 Co 89. 1 Hawk 195. 5 Co 125: 3 Bac 497.

The sale of a libel is prima facie evidence of a publication. 5 Bur 2687. Bam. 306: 12 Vinn 229. Tho the sale was by a servant, yet it is prima facie evidence of a publication by the master 5 Bur 2687.

presence & hearing of diverse persons made the charges complained of. If the words are not in the ~~[illegible]~~ tongue of the parties; it will be further necessary to say that they were understood by the by-standers. It has been made a question whether it was absolutely necessary to say that it was in the hearing: but it has been decided, that if it was in the presence, or that they were made publicly, it is sufficient, the law will presume that it was in the hearing. So that it is still necessary that the words should show ~~that~~ expressly or impliedly that it was in the presence & hearing. Cro Ell 486. Cro Jac 39. 199. 1 Rolle 86.

The declaration must further state that the words were spoken ~~falsely~~ falsely, & maliciously. It is not necessary that the words spoken should be mentioned expressly; but such terms must be made use of as will convey the idea.

It is also necessary that either the words themselves that were spoken, or the charge which they conveyed should be named. If the words are stated, they must be proved to have been spoken, or no ~~[illegible]~~ verdict but a nisi prius from them. — But if the fact only is ~~stated~~ it is sufficient if it be made to appear by any words. —

Stating in the declaration, that the words were such & such or the like, will not ~~do~~ answer; nor is it good stating to say that the words were to the following effect. Cro H 645. Hardwick Rep ~~305~~ 261.

It must also somewhere in the declaration be stated, or made to appear that they were said of the Plff. Cro Jac 126. 1 Rolle 85.

When the words are not actionable in themselves, but in consequence of damage arising from reflecting upon a man in his profession or capacity, it must be stated that he is of such a profession. Cro El 282. Cyclo 189. — As to the innuendoes which the Dy can be sued in the habit of using, they are not necessary. 4 Co 20. Cro El 239.

As to written slander or libels. The doctrine of libels as a crime comes under the head of Criminal Law. When a civil action is brought the same rules govern in almost every instance, as in actions for parol slander. (See the foregoing)

When ~~parol~~ written slander goes to disturb the peace of a family, it is actionable; altho' the words made use of, were such as would not be actionable if spoken. 2 Burr 900. 2 Will 403.

I find there is a dicta which goes so far as to say that libel, which puts under a man ridiculous, are actionable. 2 Will 403. 2 Burr 900.

Slander by a Stat of Eng is punishable by fine. But the Common Law, & Statutes of Eng know of no such punishment. The action upon this Stat is open to any person who may wish to prosecute. Libels are of the same kind as slander, inasmuch as considered of a higher nature, it being considered as more durable, & as ~~higher nature~~ having a greater circulation. 3 Bac 490. 3 Bl 125.

The most general definition of a libel is any writing of an illegal or immoral tendency. 4 Bl 150.

This definition is found too general to be adopted in the subject under consideration. By libel in a civil injury, of definition found more applicable, is that a libel is any defamatory of a person either dead or living made public either by writing or painting. Lens Cay Ordnance (A)

Of Malicious Suits

When these suits are civil they are called vexatious law suits; When they are prosecutions, they are called Malicious prosecutions.

A mere failure in a civil suit is not sufficient to support an action for a vexatious suit. To support an action for a vexatious law suit there must not only be no ground of action, but the party must know it, before he institutes his suit. To prove that he knew there was no ground of action his ~~self~~ confession is sufficient; and any thing else which is sufficient to infer it from.

If there is a point hope of recovering, it will not be considered vexation. The object must not be to recover, but to plague the Deft with a law suit. A man may however be liable to this prosecution, tho' he has a right to recover; provided the manner in which he conducts it is vexatious. For Instance — A owes B $25. ~~A~~ Sues for $500. Instead of a Summons ~~to wait the process~~; he takes out a process & takes his body & goods for that amount: intending that he should not get bail.

It is also vexatious to sue a man before a court which has not jurisdiction; the pltff knowing ~~that~~ at the time, and it being so plain as to be manifest to all men. — It is true that they are not obliged to answer; but they cannot get costs; & it is always attended with inconvenience. — In Cos however a Court will give a Deft Cost, tho' they have no jurisdiction of the cause. 1 Saund 228. 1 Vent 12. 1 Stk 15. Hob 206. 266. 4 Co 14.

There can not be any suit maintained till the action has terminated. By the termination of the suit is not meant that the judgement be given upon it, or it may be withdrawn; all that is meant is that there should be an end to it.

As to Malicious prosecutions. ~~By~~ The attorney who prosecutes in these cases is not liable; but the man who wilfully, maliciously does acts that leads to it, without a probable ground of suspicion.

The grounds upon which a man recovers in these cases is; his anxiety, his liberty being at stake, & the loss of reputation; and the expence which he is always subject to.

It was formerly held, that to entitle to a recovery, there must be an acquittal. But this idea is exploded. If there has been an Acquittal the Pltff must show it. —

To render a person liable for a malicious prosecution there must not only be no probable ground for an action, but there must be malice. Salk 15. Stg 691. 697. & P. 490.

If there has been an acquittal, & the pltff can prove that the Deft was actuated by malice; it then lies upon the Deft to prove that there was a probable ground for suspecting the Pltff of the crime.

If there was an indictment by the Grand Jury, is a binding one of the Pltff. then the Deft is excused from showing that there was a probable ground for suspicion, the presumption being in his favour; but still the Pltff is at liberty to show that there was not any probable ground. As in the case of the Lord. which was decided in Co.

In the face of a practice having lost any goods, for which the prosecution was first commenced, the ~~Party~~ Deft & his wife may prove ~~for~~. 6 Mod 216. what they swore ~~to~~ at the trial.

When there has been two or more combined in a prosecution of this nature, it has been made a question, whether upon the suit was joint the suit could be several; but it has been decided that it could not. It must be joint, and all will be equally liable for the whole. Stg 910.

Of Assault & Battery

An Assault means an attempt to beat. Battery the actual beating. Beating does not only mean the actual striking, but pushing, spitting on a person &c. — As to the meaning of the word assault the mere waylaying of a person is an attempt, provided it is for that purpose.

If the pulling was merely in play, then it is no battery, provided the Plff has not signified that it was against his will. But if the parties had not been a playing, then altho' it was in sport, yet the pulling is a battery.

The provocation which moved to a battery will always be taken notice of in mitigation of damages.

In this, as well as in all other cases of trespass vi et armis, all the parties concerned in the injury, are equally liable for the whole damages. To make a person liable it is not necessary that he should actually lay hands upon the person injured, it is sufficient if he aids & assists or encourages, by his words & actions in countenancing.

A Judgment against one, or a compromise with one, is a bar to a recovery against all the others. Yelv 68.

If the whole Judgment has been recovered ~~against~~ out of one, he has no remedy against his partners in the suit.

Those who are not partners in a suit are excused tho' partners in the offence, provided those prosecuted are recovered against.

Persons interested in the offence, ~~yet~~ not ~~partners~~ parties in the action may be made witnesses. The interest which they have to produce a conviction is not a sufficient objection when they are partners in crime as; tho' it would be ~~when~~ were it upon a action which contained no wrong. Policy demands that this ~~law~~ rule of excluding interested persons should not govern in crimes.

If a man is ~~[illegible]~~ made a party who is innocent, and the Deft wishes to procure his testimony; the Court will, provided no shadow of proof is produced, order his name to be struck out. If there is any proof they will direct that he shall be tried first.

As to the action. There are cases where, then, injuries are remedied by trespass upon the case; as well as by trespass vi et armis. The distinction between them is — When the injury is immediately the consequence of an ~~unlawful~~ act, then trespass vi et armis is the proper action. But if the injury is remotely the consequence of an ~~unlawful~~ act, it is then proper to bring trespass upon the case. For instance — If a person should throw a stick of wood, & it should injure a person, then trespass vi et armis would be the proper action. But if a person should intentionally lay a stick of wood in the street that a horse might stumble upon it; then trespass upon the case would be the proper action. — Also see the case of the Squirt. 8 Will 203. 2 Will Jr. 892. Will NP 16. —

It is an excuse for a trespass if it was committed thro' mere accident; excluding all idea of carelessness, or of intention of doing a wrong act. From these requisits of an excuse for a trespass it will appear that a trespass may be committed, altho' it was thro' accident, and there is no wilful neglect; provided the person at the time of committing it is in pursuit of an unlawful act.

But where a man is in pursuit of lawful business, and is guilty of no degree of negligence, or wilfulness; Judge B. thinks it can be fairly inferred from the books that he will not be liable for a trespass. Hob 134: 4 Mod 405. 1 Stk 637. 3 Bl Rp 897. Bull NP 16.

It has formerly been said that if a number are joined in a suit, & one dies, that the suit abates. But this rule does not govern in this action. 6 Ell 143.

The defences to an action for assault & battery are, 1 Not guilty. 2 Something may be plead in excuse. 3. That the Deft had a right to commit it.

If a man should first assault another, & the party assaulted should commit a battery in his own defence, this could be plead by way of excuse. It is not necessary in order to this excuse, that a battery should have been committed, an assault is sufficient. If a man should lift a cane in order to strike another, he need not wait the blow, to commit an excusable battery.

All the batteries in self defence are excusable; yet the party assaulted must not exceed what will be sufficient to preserve himself from injury; perhaps the court should not be rigid as to the exact quantum of battery, but it must not be flagrant. Bull NP 18. Stk 642. 1 Ld Ra 177.

There is one rule to be found in the books, when a man is not excusable for defending himself, but must run. viz When the assault is in a Church, a Church yard: but this rule is probably now exploded. 6 Js 367.

~~Parents & Children, Husband & Wife~~ Parents & Children, Masters & School Masters, are excusable for moderate chastisement.

Moderate Chastisement, means that it must be under such circumstances as to exclude the idea of the persons whipping with an improper temper of mind. If it has exceeded in some small measure that men generally would think right, yet if the temper of mind was not an improper one, they are excusable; for to a certain extent, they are judges of the quantum necessary. The malice may be inferred from the circumstances attending it; as the enormity of the fact &c. It is therefore the business of the triers, in order to find a verdict against these persons, to find first, that the whipping was excessive, & secondly that it was with an improper temper of mind. Hawk 130.

If a person attempts to take the goods of another, he is excusable for beating him, to the extent which is necessary to preserve his goods. And in all cases where the law excuses a battery for some particular purpose, you must not pursue it further than is necessary for the accomplishment of it.

If a man attempts to break into a house, or enclosure with violence, you may beat him till you exclude him; or till he desists in his attempts. But if a man enters peacibly, you should first order him out; & if he will not go, then you may beat him. 2 Stk 641. Hawk 130.

Another excuse for a battery is when an officer arrests a man, but he is not excusable for using any further violence than is necessary to keep him prisoner. 2 Stj 1049.

~~A Master & Servant, &c~~ A parent & child, and a Husband & Wife, are mutually justifiable in assaults & batteries in defence of each other. A Servant is likewise excusable for a battery in defence of his master; but whether the master is in defence of his servant is made a question. 1 Ld Ray 62: 3 Bac 568: 1 Stk Com 429.

(1) This rule cannot apply in New York, for we have a stat which declares that the ~~[illegible]~~ figures shall not merge in the Estate.

If the Deft would deny the charge, he must plead not guilty. — If he would wish to offer an excuse, he may plead it specially on record, or give it in evidence under the general issue.

If by way of justification, as in the case of an officer, he must plead it; and he should have it so broad as to cover the declaration. — In Cor even a justification may be proved under the general issue. Bull NP 17.

If for instance the declaration should state that the Deft struck him; the plea ought to state that he was justified, because he had taken him upon a legal process, & it was necessary to restrain him. And in all cases it must fully cover the charge. Cro El 268. 1 Ld Ray 229.

If a father beats the assault, it is no defence for a child to plead that it was in his fathers defence. 2 Str 555. Salk 11.

In this, and most of the States there is a Stat which requires that these actions should be brought within a limited time. And there is no such thing as the right to this action being revived, as in Contracts, by the Acts of the Defendant.

When a master brings an action against his servant, or when a parent, or school master brings an action against those whom they have the right to chastise; & the Deft pleads that an assault was first made upon him, the Pltff must in his reply state his station with regard to the Deft.

These wrongs give rise to two actions, one for the satisfaction of the party, & the other for the public. But a recovery by the Public cannot be given in evidence in the Pltff suit. And for two reasons. 1st Because ~~you can never show~~ a verdict can ~~never be given in evidence but in another suit~~. 2d Because the Pltff is ~~[illegible]~~ most usually a witness in the public prosecution. 1 Str 68. 1 Lev 325. There is a principle in law that a man may not show a felony in ~~support~~ defence of his claim. But in actions for battery this rule does not operate. 1 Str 74. (1)

Thus in your declaration you allege the battery to have been committed at one time, yet you may prove it to have been committed at any other time; provided it is within the Stat of limitations. This rule holds in all cases when the plea is not guilty.

But if the ~~Pltff pe~~ Deft ~~pleads~~ demurs ——— that admits the charge; then the Pltff cannot show that it was committed upon any other day. Bull NP 17. Brownlow 233.

If a number of persons are sued for the same wrong, & the jury apportion the damages, the Pltff may arrest the judgement, for he has a right to full satisfaction of the injury out of all of them.

And the Defts may arrest the judgement in this case also; ~~the reason upon which principle is to prevent the costs which would arise~~ ~~from several actions~~. But if the Pltff chuses to accept of one of the sums he may, & he will be allowed to execute against all for that amount. Bull NP 20. Hob 70. Salk 19.

If one of two Defts demurs to the declaration, & the other pleads not guilty; what is to be done if the declaration is found good, & the one pleading not guilty, was found guilty, & a verdict was given against him for £100, the suit being for £500? In this case they are both liable for the £100 & no more. And it would be only one suffer by default. Co Ls 110. 11 Co 67.

If in the above case the declaration had been found insufficient; then judgement would not have been given against either; for no judgement can be rendered upon an insufficient declaration, which has been so declared by the Court.

If some of the Defts have been found guilty, & others not; those who were innocent will be allowed their costs; & the others will be liable in damages & costs.

Mayhem is an injury which disables a man from defending himself. In this Country the circumstance of a mayhem differs in no respect from any other ~~[illegible]~~ grievous battery. But in Eng there is a rule of Law, that when the Jury find Mayhem, the Court may increase the damages: which is contrary to the general spirit of the law. 1 D Ray 176. And also when there is no mayhem if the Jury think fit. In Eng when suits are brought for Slander, or Assaults & battery; & the more than forty Shillings are recovered, they shall not be allowed more costs than damages. This rule which both in Eng & Con is by Stat is made to prevent persons from carrying petty suits before high tribunals. — (2)

Of Trespass vi et armis for False Imprisonment.

Every detention of a man's person without lawful authority, is false imprisonment. Even if it is nothing more than holding a man in the street against his will.

It is a general rule that no action lies against a Judge for any Judgement given by him. This is true in this as well as in other cases. — This rule means only to protect Judges who are regularly so, & not such as Assignees &c. — The regular Judges contemplated are such as fill the Law benches from the Supreme Judges, down to Justices of the peace. Salk 396. (1)

What if a Judge renders a Judgement mala animo? Judge Reeves thinks that enough can be collected from the following case, to show, that he ought to be liable. 1 Term Rep. Gov. Johnston's case.

There are many persons who cannot be imprisoned, as Executors & Administrators as such. To imprison these therefore, is false imprisonment, both in the Attorney who advised it, ~~& the Officer~~ and the Client, ~~who execu~~ ~~the order~~. 3 Will 368.

There are persons who are privileged from imprisonment under certain circumstances; as suitors & witnesses attending Court; the privilege extends to the time which they are going, returning, & staying at the Court. — As to the place which they will be protected in coming to, the rule is that they shall be placed in Statu quo.

If they should be arrested in Eng, it would not be false imprisonment, altho' he informed the officer of his situation; provided the officer took him to Court to ascertain the fact, which in such cases it is his duty to do. They then do not give a protection till the witness appears in Court.

But in Con the witnesses are allowed a protection before they come from home, and so are the suitors. It has therefore been made a question whether it would then be false imprisonment to arrest a person in either of these capacities, without a protection? Levying upon a person after he had got a protection, would be false imprisonment. 2 Jo Rep 110 Yo. & J. 379. It is now settled that it is not false imprisonment; but the party may be set at liberty upon applying to the Court.

[illegible] action of false imprisonment lies against a Judge of a Court of Record, for any act done by him in execution of his office, nor for any Mistake of Judgment; neither are his decisions transitive. Sep 326. Salk 396.

The Censors of Physicians are Judges of record because they have power to fine & imprison. Salk 396.

(2) As to the general ground of objection to the evidence as hearsay, it is in every day's experience in actions of assault that what a man has said of himself to his surgeon is evidence to show what he suffered by reason of the battery. 6 East 198.

(1) And a distinction was taken between precipitancy and irregularity; viz "That if irregular, it is the act of the Court, & the party shall not suffer; but if it is irregular, it proceeds from the act of the party or his Attorney, & an Action of false imprisonment will lie on it. Lofft 329.

A distinction is to be observed in the case of officers & private persons. If the action is against the Shff for the arrest, he shall justify sufficiently, by shewing the writ. So it is in the case of the bailiff & his officer with this difference, that the Sheriff must show the writ returned, if returnable; which the bailiff need not, as it is not in his power. But if the action is against the Plff in the first action, or a mere stranger, they cannot justify unless they shew a Jud.t as well as an execution, for the Jud.t might have been reversed. Lofft 333.

There are Statutes both in Eng & Con – That say that an officer shall not arrest a man on Sunday; and if he does, an action of false imprisonment lies against him. – But if a man escapes after having been once arrested, he may be retaken upon Sunday, with impunity. 1 Salk 78.

If an officer should arrest a man thro mistake; an action of false imprisonment would still lie: but the mistake would be considered, & mitigate the damages. – Upon this head they have been pro so far as to say, that if a man contributed to the mistake, still this action would lie; altho' nothing, or little more than nominal damages would be given. As if a ~~man~~ Debtor should confess himself to be the man, ~~to~~ whom the officer was in pursuit of, when he was not. But when carried thus far it violates that principle of law which forbids a man to take advantage of his own wrong. Dixon 487. Hardres 323.

If the process is erroneous; as if the judgment be erroneous, and is reversed; can false imprisonment be supported, for acting under it? When the process is void; as when the Court had no power to issue it, either upon mesne process, or judgment, the person who procured it, altho ignorantly, is liable to this action of false imprisonment. – But with respect to the officer it stands upon a different footing. The officer is sometimes liable, & sometimes not. The Officer is bound to know the laws of the land. If the process was such a one, as the Court had the power of issuing in some cases, & it does not appear upon the face of it that it had not in this, he is not liable; for he is not obliged to look further & ascertain whether the present process was founded on such a case. For example – A Justice in Con has Jurisdiction over offences & suits, where the sum demanded does not exceed seven dollars; & in case of notes, his Jurisdiction extends to £10. If therefore a process issues for £10 & it does not appear on the face of it that it was not for notes; the officer is not liable for proceeding upon it. (against this doctrine see 10 Co 70) in support see 2 Roy 229. Prescott & Carpenter. 2 Sha 993. In this last case the Dept, altho not liable primarily, yet he became so by joining with a person who was; for in all ~~pro~~ cases where a man joins in pleading, altho himself not liable, yet he is liable for keeping bad company. Sha 590. (1)

That officers are liable, when it appears upon the face of the process that ~~they had~~ the Court had not Jurisdiction, many cases may be ~~produ~~ produced. 2 Sha 1002. 1 Ld Ra 740.

Those Courts which are not liable for imprisonment ~~without~~ without lawful authority, must be courts of record.

Commissioners of Bankruptcy are one of that class of Judges, who are not exempt from an action of false imprisonment. 2 Ld Ray 1035. 2 1005: 2 Ld 1141.

Many cases are to be found in the books, where Justices have been made liable to an action of false imprisonment, for improper Commitments. For instance – for certain offences a penalty was inflicted, & if the party did not pay, the Justice was invested with power to issue a process against his goods; but instead of so doing, he issued a process against the person of the Debtor. – The reason for this is, that in Eng Justices, are not upon the same footing as in Con; here they are Courts of record; but there they are not, but are only invested with power to try certain ~~offences~~ cases; there being many other inferior Courts for trying of others, which are of no higher a nature than those in Con. 1 Sty 710. 1 Will 153 & 1 Burr 536 &

It has been made a question whether an action will lie against an officer for false imprisonment, when ~~another~~ the person was the real one. It has been decided that it will; and where he was active in it it will lie. ~~supposed as if he was active~~ 2 Blk 1055.

It has likewise been made a question whether an action of false imprisonment will lie if it was committed in another County. It will lie, and also for assault & battery. Fr. Dry the person of the defendant was assaulted & was committed within the realm. Ch for an assault & false imprisonment within the City of London. Cowp 161.

It has been shown that an officer can justify in many cases, when a private person cannot. In such cases it is enough for them to show his warrant. But if the party is could justify he must prove to the judgement. 1 Blk 400. Cowp 20: 5 Co 90.

In Civil cases it is always necessary for an officer to have a warrant, to justify himself against an action for false imprisonment. But in Criminal cases it is generally ~~not~~. But if the officer sees the ~~offence~~ felony committed, he may by virtue of his office arrest, without a warrant; & if other persons come & give information to the officer of the commission of a felony, & state that there is danger of the escape unless he be immediately taken, the officer may at his discretion pursue & take, without danger of this action. In the first case he is not at liberty to arrest ~~or not~~ at his option. — If there was in fact no felony when the representation was made by other persons & an arrest was made, they, & not the officer are liable to this action.

If a private person is witness to the commission of a felony, he may arrest. But is not punishable for omitting so to do. Nor is a private person obliged to take notice of complaints; but if he does, & there was no felony committed, he is liable. Dory. Samuel Ds. Payne. 359 & 360. ~~In case there is to this action of false imprisonment, a limitation by Stat.~~

If a person committing felonies, is not complained of within a limited time, he is by Stat, not punishable.

Of Trover.

This action is brought 1st When a man has got possession of the goods of another wrongfully. 2d When a man has got possession rightfully of the goods of another, & converts them. 3d When he has got possession of the goods, & refuses to deliver them up: There being no other proof of a conversion, ~~that this is sufficient~~ but this is in most cases sufficient to support this action.

The Conversion is the gist of this action.

As to what is a conversion. Destroying the goods of another, which one has in his possession is a conversion, as much as if he actually converted them to his own use. (1) Keeping them even without using them if a person refuses to deliver them up on demand, is a conversion. When the taking is tortious, no demand need be made; the tortious taking is of itself a sufficient circumstance to infer conversion from. 3 Will 146: 5 Bur 2657. Sha 943. (1)

If there was a rightful taking, & a destruction; the need not make a demand.

If there is no proof of a destruction, & the possession was rightfully obtained, ~~he must make~~ a demand must be made in order ~~[illegible]~~ to support this action. This, as a presumption, is sufficient to raise a presumption of a conversion: But like all other presumptions it may be rebutted by the Deft.

(1) In this case no demand need be made.
Stea 688
And in all cases where you can prove a conversion a demand need not be made.

And in all cases where you can prove a conversion, a demand need not be made.

In alledging a conversion, a demand need not be stated; for this is merely the evidence of it; and it is never necessary to state the evidence. It is true that in contracts a demand must be first made, & that it must be stated; but this is not by way of evidence of the contract, but as a performance of the Pltff's part.

Trover is sometimes convenient with trespass. As it would be in case a man should take goods from off another's land; then trespass or trover may be brought; if the latter is preferred the ~~latter~~ former must be formally waived.

When goods are got rightfully, this is the only action; the formerly detinue lay.

To support this action, it is necessary to prove that the Pltff has some right in the goods, as of possession &c. And it is also necessary to prove, either that the Deft has, or has had possession. And it is also necessary to prove either an express, or ~~implied~~ presumptive conversion.

If the Pltff can show possession, he can maintain this action for the goods against any person but the right owner. 1 Mo 505.

It is of no consequence what the right of the Pltff was, provided the Deft can show no right. 3 Wils 332.

And altho a man had not the possession of the goods at the time which they were taken, yet he may maintain trover. Bull N P 33.

A person who has only a special property may maintain trover, because, as the case may be, he may possibly be liable to an action. But if a action does not lie with the Deft to say that he is not. — But if a man sues & recovers goods, in cases where if he had not recovered them he would not have been liable, yet he is entitled to ~~for them~~ 1 Mod 31. Because the specialty property man has a right of action it does not follow that the general property man has not. But if the general property man brings his action, the specialty one is bound from his liability, and this altho' he was liable by contract.

If the specialty property man bring an action, he is entitled to recover both the goods & the damages he has sustained by being deprived of them; and his suit is a complete bar to the general property man's. — But if the general property man brings a suit, it only bars the specialty from bringing one for the goods; but not for the damages.

If the property stolen & converted has past thro' a number of hands; only the person having possession & the one taking it are liable to this action; provided the intermediate persons were not privy to the fact. At least there is no precedent in the books that recognises the idea of their liability. 1 Wils 8: 2 Stra 1162.

There is one species of property for which you cannot bring trover. Coin. Money. And this rule holds altho' you can identify the pieces. — This rule is founded upon policy; to prevent accounts being burthened with ~~mere charges~~ enormous, which would go to destroy its free currency. 1 Salk 126. 6 5. 1 Str 458.

If a man is intrusted with property, & he delivers it contrary to orders, he is liable to this suit. 2 Burr 2360.

If the property was taken wrongfully, trover will lie, altho' it is returned. The returning will however go in mitigation of damages.

If the property came legally into the hands of a man who refuses on demand to deliver it up, trover will lie. But if it is not returned, a recovery vests the right to the property in the Defr. Str 1078.

If a man converts part of the property to his hands, which injures the residue, trover lies for the whole. 1 Str 596.

If a man has property in his hands to do something upon, or to keep, & refuses to deliver them up till paid, still trover will lie in most cases.

Trover is an action which can only be brought for personal Chattles. — Altho' a man goes into another field, takes ~~either~~ grass, and trover will not lie. It was formerly held that a trespass upon real property immediately vested the right of it in the trespasser. Therefore it is probable that this rule originated from that principle. 6 Js 126.

If goods were found & lost again; trover will not lie. But if there was gross negligence, which was the cause of their being lost, an action upon the case will lie.

Intermeddling with property which a man has of another in his hands, will not support trover, provided it was advantageous to the property, altho' it was an advantage to the Bailee. 6 Js 148.

If clothes were delivered to a person, & were worn & eaten while in his possession, trover will not ~~lie~~ lie, for there was no advantage to the Bailee. 6 Ch 219.

It has been already said that a refusal to return goods when demanded, altho' they came lawfully into the possession of a man, raises a presumption of a conversion. If the Jury find a special verdict containing these facts, yet the court is not at liberty to determine that they were converted. For a court is not at liberty to make any inference but what is a necessary implication from the facts stated. 2 Wood 149.

Tenants in Common, or Joint Tenants, cannot maintain trover against each other; for each has the right of property. Sk 290.

To this last rule there is one exception; if one of the tenants destroyed the property, trover will lie. 6 Lis 200.

It has been made a question whether trover will lie against an Executor, when his testator had trovered goods? As, for example, if the testator should trover a horse. — If the property came into the hands there is no doubt of his liability. But trover will not lie; for there is a rule of law that personal wrongs die with the testator. — ~~But if the testators property was corrupted by him, then an~~ An action upon the case ~~will lie~~ will. And the reason of this rule stands not regard to other wrongs when the testators property was benefited thereby. Cowp 375. Hambly vs Trott.

If a borrower of money or money paying property as a security, he cannot recover that without first paying or tendering the money actually advanced; trover being an equitable action. 1 Ch 158.

2 Roll 569.

Trover will not lie for a negro any more than for any other man, according to the laws of England; for the Common Law takes no notice of negroes being different from other men. By the common law no man can have a property in another but in special cases, as in a villain. 2 Ld Raym 1346. 1 Str 16.

Although as a general rule, the taking of another's property will support trover; yet there may be such a motive, when a man will not be liable to this action. If for instance a man's sheep should wander into another's lot, & be determined with his dog and he, in order to separate them, should drive them in a pen. — So also when property was taken to obtain a right, ~~which~~ which a man has a right to obtain. —

The taking of another's property to prevent an irreparable loss, will not subject a man to trover. But if the loss which was about to overtake the property was not total, trover will ~~not~~ lie.

If a man's house was on fire it would not be proper to remove his goods, for the loss would have been total. But if his house was in danger, it would be lawful to remove it, for the loss might not have been total. — This rule would at present, in all probability be much relaxed by modern courts; it having obtained the ascendancy from the Mahometan ~~Jealousy~~ Jealousy of which pervades the Passions under the feudal system, with regard to the right of property.

Neither trover nor trespass will lie in favour of the bailee against the bailor. But if property bailed be wrongfully taken from the bailee by the bailor, the former may have an action in the case against the latter to recover special damages. ~~The action of Gelly v Pelly~~ ~~in 2 Ld 245. Lev Charter. 248. to be called Mem~~ 13 Co 69. Cro 413: 4 Mod 51: 5 Co 86.

If a man have lien upon goods, trover will lie for not delivering them upon an offer to remove that lien; or for any after intermedling. As if a man should retain, or use goods, that were given him in pledge, upon offer to remove the lien, by satisfying the demand. 8 Co 146. Hob 590. 2 Ra 752. 4 Mod 222.

1 Burr 20 — Trover lies against an officer for taking goods under execution from a wrong man. — But if he took the goods upon a writ of replevin, trover will not lie. This difference arises from the form of the writ. In an execution he is directed to take an identified man's goods; in a replevin, he is directed to take certain identified goods. Carth 381.

~~A specialty property man cannot bring trover against a general property man.~~ ~~A this is an action~~ action.

But a general property man, may maintain trover against a specialty property man, in many cases. — As in case he should use them for a different purpose than what they were bailed for. 5 Co 14. Cro El 780. 784.

A servant who moves by order of his master, is still liable; for it is a rule of law that a person is in no case excused for torts by coercion, excepting in the case of a wife, covered by her husband.

If a Sheriff orders a man to assist him in levying an execution upon property, which levy should prove a violation of a man's right; persons so assisting would not be liable. But if the assistance was voluntary, ~~he~~ they would be liable as well as any other ~~person~~ law. Carth 445.

It has been made a question whether if one person lost property from another, & it passed from the wrong doers hands into a third persons, whether trover would lie against the third person? But it has been decided that it would. The doubt originated from the principle, which has been before mentioned, that a tort wrongs divested the owner of the property of the right, & vested it in the wrong doer; but as this principle is exploded, the consequences flowing from it ought of course to cease. 1 Sid 438.

It is laid down in the books that trover will not lie against bona fide carriers. It is true that if he was robbed, trover will not lie; nor will it if they were destroyed thro' his neglect; but if he in any way converts them to his own use, trover will lie against him. Hob 17. 2 Ld Ray 330. 2 Salk 655.

The detaining of property, merely in compliance with the law which a man has will not support trover. & so if a tenant begins should detain it in satisfaction of his ~~debt~~ demand for entertainment. 1 Salk 654. 2 Show 181. Ld Ray. 860.

The declaration requisite may be gathered from what has been said. It is necessary to state the loss, & that another has found it &c

Formerly there was a great particularity required in the description; so particular as that it would be sufficient to identify the property, so as to be a bar to another suit. But this ~~opinion~~ is not so rigidly demanded now. 2 Ld Ray 869.

As to what evidence will support a conversion has been already shown. 2 Str 869.

The plea under a general issue, is not guilty; & by under a general issue, in this action every thing may be proved that can be concerned. In Con we have a stat which opens that a release should be plead specially. 1 Show 126.

If two persons own the property trover, & only one one sues, the Deft may plead the origision in abatement. If he omits to plead it in abatement he cannot show it under the general issue. Salk 290.

There is in Eng a limitation to this action, by stat. In Con we have no stat of limitations which comprehends trover.

The action of trover was unknown to the Com Law. But this action & Indebitatus Assumpsit, & all other actions on the case were introduced by the Stat of West 2. 13 Edw 1 3 Bl 123. Hp 538. 3 Term R 89. 243. 585. 586. 2 Swift 20. Qu Were not actions on the case known at Com Law? 3 Bl 123. 2 Ld 129. The finder of goods has no lien upon them for his expenses & trouble at Com Law. But by a stat in Con he has. 2 Hl Pl 18. 2 Bl 254. Hp 585. If a person delivers goods to one who has no claim to them he is liable in trover. Hp 581.

In all cases of unlawful taking this action is concurrent with trespass & Indebitatus Assumpsit if the goods have been sold. Comp 419. Bul 131. 2 Ld Ray 144.

A return of the goods after trover will not discharge the ~~fine~~ action, tho it will be in mitigation of damages. 1 Ld 596. 3 Bl 902. Hp 581

1 & 2nd of the Deft in this action, Verb the property of the goods in the Deft, unless it has been returned in mitigation of damages.

Of Trespass vi et armis

with respect to personal property.

Trespass has been considered with respect to Assault & battery & false imprisonment.

This action of Trespass vi et armis with respect to personal property, is concerned in many cases with Trover.

It was formerly held that Trover waived the damages a party was entitled to in an action of Trespass vi et armis. But in practice, according to the present usage no difference is made.

If there was merely a destruction of property, without any asportation, Trespass vi et armis is the only proper action. As for example, if a man shoot another's horse.

Trespass vi et armis, is distinguished from Trespass on the case, in this; the first is direct, the second is consequential. Trespass on the case is the only proper action, when the injury is consequential, provided the act was lawful. Stra 635. 2 Str 1002. 2 Bac 759. If the act done the injury was a consequence of an unlawful act then nonfeasance will not support the action of Trespass vi et armis; but Trespass on the Case. For example, it was made the duty of a Person to repair a bridge, & in consequence of his omission, a person horse was killed, Trespass on the Case is the proper action.

If damages have arisen from a Trespass vi et armis, redress for the Trespass, & the consequential injury, may be recovered in the same action, by introducing the damages under a per quod. As for Trespass vi et armis in breaking a fence, per quod the cows entered & destroyed the Corn. 2 Ray 273. Carth 437. Stra 635.

If a man does an act which the Law gives him a right to do, and he does in the prosecution of that act some unlawful act, the Law makes him a Trespasser ab initio. The Law allows any man to enter a Tavern; but if after entering a person proceeds to violence by destroying the furniture, the Law makes him a Trespasser vi et armis ab initio. But a person to pay for what he called for, would not subject him to this action, for that is merely a non feasance.

It is said that because a Sheriff is liable to an action of Trespass vi et armis, when he takes goods & does not make a return of his ~~goods~~ writ; this is an exception to this rule. Judge N— conceives not: a Sheriff cannot give such a writ in evidence, & consequently it does not appear but he acted entirely without authority. 1 Salk 409. 2 Ray 632.

But if a man enters upon premises with the consent of the owner; & commits a trespass, Trespass vi et armis will not lie, but Trespass upon the case: Unless he procured the property thro' deceit, or fraud, for that purpose.

The ~~this~~ action of Trespass vi et armis cannot be brought by a man, because another has been abused, nor it cannot be brought by a father for abuse of his child. Cro El 786. 1 Salk 119.

It supports trespass viet armis in real actions, possession is in fact always necessary. But a right to personal property is supposed to found it upon. — In case of right real property is considered a possession, as much as in personal; & consequently it will support this action.

If a specialty property man is in possession, I take a general property man may bring this action.

2 Roll. 569.

The rules which were laid down in Trover, with respect to the general & specialty property man right of action, applies to this case of Trespass viet armis.

If the possessor in most cases, entitles to an action for the property taken; yet it is said that a mere naked bailee cannot support this action. The reason of this is, because no degree of negligence, nor any misconduct, can subject this bailee to an action; unless it be accompanied with gain. 2 Ra 915. 915. 1 Salk 26. 443: 1 Mod 31. Mod 313.

In this action, as well as that of personal alone, it seems from the books as if there must be some fault; or the action must be involuntary. — But if the injury originated in mistake, still the offender is liable. Kelly. Latch 13. Yelv 165: 1 Leo 37. 20 Vin 434. 2 Salk 637 2 Ra 36

All persons who are implicated in an unlawful act, are liable. But if a person acts by the order of the Sheriff he is not. Also is a bound keeper if the goods are unlawfully impounded. When a man is obliged to do a ministerial act, he is not liable; when not being any agent on his part. Cowp 476.

Of the declaration. He must state that it is brought for the injury done him. He must specify the goods, & with convenient certainty, as in trover. 2 Ken 2455. Sho 637. 2 Ld Ra 1410. If there were substantial trespass of another kind; I say a person should trespass upon a mans house, & take his goods; then he should state the trespass, & the taking. 3 Will 292.
The property must be stated to be the Plfs. Co Ll 4: 1 Salk 640.
It is usual to state the value. Judge N — knows of no reason for this; for it is altogether immaterial what the sum is, provided it is within the jurisdiction of the Court, before which it is brought. It is also customary to state the day; this is also immaterial for all trespasses may be stated upon any day. It is true that if a mans undertakes to justify on a particular day, & the Plff answers to it, he is obliged to prove it on that day; but if the Chuser he may answer on another day. The day must be within the three years limited by the Stat. Co Ll 32. a 72.

It has been made a question, whether it was necessary to state that it was vi et armis, the jury bring it. It can it has been decided not to be necessary. 2 Salk 636.
Also also with regard to the word Contra pacem.
Co Ll 4 b 2. Hales & Hewes Hist Com Law.

If a man would admit the taking of the property, & plead any thing in justification, he must by the rules of the Common Law plead it specially on the record. As if an officer would wish to justify, upon the ground that he took it under a judgment; he must plead

it specially on the record. Cro Lis 282. 1 Sha 61.

When any thing is plead in justification, it must be plead broad enough to justify the charge. Sid 208.

In this case of an Officer, he need not justify, gainst the Judgement. But if the party who procured it would justify, he must go into the Judgement

If a trespass is stated & alias enormia, or other enormities; you cannot prove under the enormities, any acts which would of themselves be a sufficient ground to support an action of trespass. But circumstances which are mere aggravations, can. Sid 223.

Of an Action of rescues

This action lies, when a man's person, or property when lawfully taken has been violently rescued. ~~This action~~ It also lies either for a rescue under a mesne or final process.

If a man has been rescued upon a mesne process, & has not been confined, the Sheriff is not liable: but he may return a rescue. But a rescue upon a final process will not excuse him.

If ~~property~~ a man has been rescued upon a mesne process, & has not been confined, an action will not lie against the Sheriff, but against the party rescuing. A rescue under any other situation subjects both the offender, & the Sheriff.

A rescue will subject the Sheriff let the power be what it may. For he is in the eye of the law, supposed to be armed with the whole force of the country, which is sufficient to repel it.

To recover upon this action, it is necessary for the party suing, to prove a probable cause of action against the person whose goods or person were taken. It is also necessary to prove that the officer had a writ.

The quantum of damages will vary according to circumstances. The jury may either give all that the party would have recovered, or the amount of the execution; or they may give a part, by way of smart money. When a party is about, to be has been rescued, & may be recovered against; then they usually only give smart money. If the whole amount of the legal demand that a man has against another is given, it is a bar to an action against the debtor. But when but ~~an~~ a part is given, it is no bar to the recovery of the whole demand against the debtor. —

This being a bar, is not for the debtor's benefit; the principle on which he is exonerated is, that when a man has had a full satisfaction against one he cannot have another. 6 Mod 211.

If the person rescued is insolvent, then the whole will be recovered against the rescuer; but if he is solvent, & can be retaken, it is usual only to give smart money. This rule is founded upon that principle of Law, that a man's body, is a full satisfaction of his debt; whether he was worth any thing or not; and taking him away altho' he may be retaken is considered as depriving the Creditor of him for ever.

The man rescued (altho' interested in the decision) is a witness. This, as in cases of partners in crimes, is founded upon a principle of policy.

As to what constitutes an arrest. It was formerly held that it was necessary to touch a man to constitute an arrest. But there is some relaxation from this rule. If the man, consents to become the prisoner, it is not necessary to touch him. Hardwick 12.

It is said in some of the books, that an officer must show his warrant. But this rule is not necessary to be adhered to, it will hazard the safety of the prisoner. In such cases, it may be dispensed with until he is secured. Co. Lt. 285.

When the Sheriff may possibly be made liable for a rescue, he may maintain an action for a rescue: If the rescue was upon mesne process, before the prisoner had been confined, the Shff cannot maintain an action ~~an action~~ against a rescuer because, it is not possible for him to be made liable.

If the Shff recovers out of the ~~Shff~~ rescue, it is a bar to an action against him by the rescuer. 1 Stra 434.

The officers return is prima facie evidence of a rescue; but it is traversable.

Another action of Trespass vi et armis is upon a

Writ of Replevin.

There are two kinds, & for two different purposes. In Eng there are two; one of which is of the same nature as one of the by writs of replevin.

In Eng the landlord may take out a distress, which was an execution for an immediate satisfaction of a debt for rent, without suing. To prevent the abuse which had arisen under this power, a writ of replevin was allowed. This is a writ, ordering the goods to be delivered up, upon procuring a bond, to answer the judgement of the court as to the sum due. This was the origin of this writ which has since been used for different purposes.

~~In this Country we have no such writ, for we have no such landlords, we can do it in a court without authority from a court.~~

In Co. The replevin was of replevin is common with them: This is when ~~goods~~ cattle are taken damage feasant & impounded. It is a rule of law that they shall be held in pound till the damages are paid; if they cannot agree as to the quantum of damages, the cattle may be taken upon a writ of replevin, which upon procuring bond to answer the damages, will entitle him to take them from the pound.

~~Process after Judgment may be taken out either against the party or the bond-sman.~~

The person impounding should notify the owner.

The bond to be given must be large enough to cover the damages demanded.

The person damnified has his election to sue for damages, or to impound the cattle; if he chuses the latter, he cannot have recourse to the former.

If however they escape, an action will lie, either against the pound keeper, or the owner.

(1) is six days. If in that time they are not taken out or replevied the Pound Keeper upon giving forty eight hours notice may sell them. There is also by stat. a provision made for feeding the cattle in pound. See Stat N.Y. 334

(2) By the Stat of New York if goods are ~~unjustly~~ taken and wrongfully detained, the Sheriff by a writ of replevin, or upon complaint shall cause them to be delivered up. The Sheriff may break open any house or place to make replevin, first demanding entrance. — If it is awarded that the distrainer properly took the Pltff may sue out a writ of second deliverance; but if it is then awarded against him the distrainer is irreplevisable. See Stat N.Y. in full upon this subject.

(3) The principle upon which this proceeds is that it is the duty of a ministerial officer to know his duty & to act conformably to it.

If they are not taken out within a time allowed by the statute, then they may be sold. The time ~~of~~ limited in this State

(1)

Another kind of writ, & which is peculiar to the eastern States, is a writ of replevin for goods taken upon a Trespass. The common Law knows of no such process as attach not upon mesne process. In N E If property is tendered upon a mesne process, a party cannot proceed against ~~the~~ the person.

~~When property is thus taken, a party may recover the possession of it by a writ of replevin.~~

If execution be taken out upon a Judgement, the party may resort to the bond, that standing, as in the case of cattle, in the place of the property to respond Judgement.

~~In Con~~ If a Justice takes the bond of the party suing out a writ of replevin, without any other security, & he proves unable to answer the Judgement; the Justice is liable. (3)

In Con & the stat says that the bond shall be to answer the "Demands &c". Now it is made a question whether a bond=man would be liable for more than the value of the goods replevied? According to the letter of the stat he clearly is; but the object, spirit & reason of the law would oppose it. Judge B — Thompson thinks that he would not be liable for more than the value of goods seized. And the principle that the spirit of a law, may countervail the letter, is recognized in many cases. For example — Bail Bonds; which are conditioned that the party shall surrender himself at the court, at which the writ is returnable, is not forfeitable if he surrenders himself any time before the execution comes out. 1 Salk 384. 8 Co 124. Bull NP 60. 1 Show 472. Co E 522. 2 Dunf 617.

(2)

Of Adultery

This tort is usually arranged under the head of Trespass vi et armis, tho' it most properly belongs to trespass upon the case. It is a principle of the common Law, that the wife has no will; the law therefore concludes that this offence must be by force & violence. — But notwithstanding this it is usual to go on & state seduction &c.

To support an action for this injury, it is absolutely necessary to prove a marriage. In other cases, the mere living together & having the reputation of being man & wife is sufficient. 1 Bur 205.

The register of the person marrying them; or the testimony of persons present, is sufficient. It may then be asked why witnesses are admitted, when the law requires that there should be a record? When it is made a mere duty to register certain facts & another has no power to compel him to do so, then he is not deprived of the advantage of other proof. Doug: Hunt vs Bacton. Bull NP 27. 28.

A confession of the woman, that she is the wife of the man suing, is not sufficient to maintain the fact of the marriage. But any discourse between them, in which it is admitted ~~it appears~~ being to prove

Then are many things which will go in aggravation of damages; but simply the former good conduct of the wife. Bul NP. 27.

According to the latest authorities, when a man has suffered his wife to live as a bawd, no damages will be given. 4 Burr 1951. (1)

Notwithstanding this is an action of trespass, yet the Stat of limitations ~~of these actions~~ does not, then against ~~but the~~ ~~Plaintiff~~ Defendant ~~pleads~~ that the Stat which ~~pleads~~ that if the damages does not exceed 40s. that the cost shall not exceed ~~the damages~~. 2 Burr 751. 3 Will 319. In actions of assault the time of limitation is four years; but in this action the fact of the criminal conversation, & not the assault, not guilty within six years is the proper plea under the Stat of limitation. Cf. 745. 2 Burr 751. 3 Will 319.

Of Trespass upon the Case

This action lies ~~either~~ for injuries unaccompanied with force; ~~or arising thro' negligence~~. 4 ~~Bla~~ Bl. 125 892. Cr El 219.

It is not necessary that the injurious act should be voluntary; It is sufficient if it arose thro' folly. 2 Lev 72.

If the accident would not have happened, if proper attention had been paid, the party who is the cause of it will be liable. ~~Cf.~~ If I had been in the habit of throwing his wood into the highway, B came along at night & caused his horse; ~~then~~ I ~~will~~ was ~~not~~ liable. Cr J. 446.

It is a constant & universal rule, which goes thro' all cases; that if a man employs another to do his business, & he does it carelessly & wilfully; the employer will be liable. For a master is liable for the acts of the servant, as long as the servant is in the immediate pursuit of his ~~employer~~ business. 1 Str when a servant is carelessly burning a meadow, by his master's order, burnt the adjacent country. 2 Str 1094. 1088.

He is not however ~~considered as guilty of the~~ liable criminately for any such trespass.

This action of Trespass upon the case, lies ~~for~~ 1 for injuries to personal rights. 2 For injuries to personal property. 3 For injuries to the person. And in many cases for injuries to real property; but this will not now be considered.

1 For Injuries to personal rights, under this head personal property.

Under this ~~head~~ title will fall all those actions which are brought ~~against men~~ for selling unwholesome provisions: and against Physicians & Nurses, who by improper management ~~do~~ injure their patients.

~~This action lies against Physicians who do injuries to their patients by negligence or want of caution.~~

Ignorance is another ground of action against them. But this must be understood with some qualification. If it did not arise from general ignorance, but a mistake as to the particular

(1) The action for Crim Con being founded on a tort the Court refused to grant a new trial in this case, on the ground of excessive damages though it appeared that the husband had been a grossly culpable, even as far as would have justified a verdict for the Deft. The damages were 5000 £. Esp 345. 4 Term 651

But in a very late case, the Court declared that, "the jury had acted under the influence either of "misdirection, or some gross error or misconception "on the subject, we should have thought it our "duty to submit the question to the consideration "of a second jury". Chambers vs Caulfield. 6 East 244

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case, this action cannot be supported. But if the mistake was such as shows them to be an improper person to undertake it, he is ~~not~~ liable.

What is here said with regard to physicians, applies only to regular physicians. If persons chuse to employ itinerant quacks, it is their own folly, and no remedy is allowed them. But if such persons undertake specially to cure a person, then this action will lie. 2 Ld Ra 214 & 1340.

If a regular physician should undertake a mode of proceeding merely for the purpose of experiment, & should injure the patient, he would be liable to this action. 2 Wils 359.

So would a man who exercised a trade in such a place & manner, as proved injurious to another's health. But if this person first occupied a situation for that purpose; & another should come near enough to be injured, this action could not be supported. 1 Roll 90. Hut 135. Cro Jac 510

When injuries arise to a man's person or property by means of animals that belong to him, this action will lie in many cases.

It is necessary to support this action, that the beast should have been accustomed to commit violence or to attempt it, & that the owner should be aware of it.

These rules apply only to animals that are domitae or of a domestic nature.

If a man's dog should kill another's sheep, and the master was not aware of any such propensity, he would not be liable. But if he should keep the dog, after he was aware of the first offence he would be liable. — So when a dog had killed sheep, of which the master was aware, & afterwards killed a horse, he was liable. — There is one case which goes so far as to make the owner liable for the ~~first~~ second offence, even when the first arose from a provocation, as treading upon a dog's tail. But this seems to pass the principle, which is that it is improper to keep an animal who has vinced a mischievous & dangerous disposition. 1 Ld Ra 606: 2 Str 1264.

But if a man should keep animals which were naturally of a ferocious nature, as bears, lions &c, altho' he took every method to secure them, & they should escape & do mischief, the owner would be liable. Cro Jac 254. 350. Ld Ra 109.

2 Of Injuries to personal rights.

Men who stand in certain relations to others can support this action. As a husband, when his wife has been seduced away: And also when his wife is beat. The foundation of ~~this action~~ it is the loss of the wife's services, conversation &c. The action for the small money is the wife's, & would survive to her after the husbands death. Bul N P 70. Cro J. 501. 538.

A father may support an action for seducing away, or beating his child: the ground of this also is, the loss of services, expences &c. This & the other were formerly always supported in the form

per quod servitium amisit

This action would lie were a man to get another daughter with child; on the ground per quod servitium amisit.

But in ~~the~~ of this last case there is from an action, where per quod servitium amisit, is but a small part of the ~~ground~~ ground of damages, there is usually laid. ~~in~~ The principal ground of action is the injury done to the personal feelings of the father. But none but the parents are entitled to this action, the other having any right to the services of the child. The action still carrying the form per quod servitium amisit.

The damages will be regulated by the circumstances of the case. ~~As by the character of the girl, by the injury complained of, &c. The daughter being only sixteen & upwards of age, &c. the damages would be large if the grievous charge was true, but if it proved false, small damages will be given~~. 5 Will 18.

This action may be maintained by the father after the daughter is of age, provided ~~the~~ she lives with the parent. The least degree of service is sufficient to prove this, in order to give a colourable ground for an action per quod servitium amisit. Among occasionally milking a cow. 3 Bac 1095. 2 Lang 166. 2 Ld Ra 1032.

It is the opinion of some writers that the parent might maintain an action for corrupting the morals of his child; but there are no precedents of this nature.

All that has been said concerning the duty of service, applies to beating the child, or seducing him away. 2 Lev 60. Cowp 54.

When a servant engaged to live with a man a certain period of time, under the condition of a penalty; & before the expiration of the time he was seduced away & the master recovered the penalty only of the servant, he could not maintain another action against the seducer. For the principal that after a man has obtained one full satisfaction, he is not entitled to another is against it. 3 Bac 1345. 2 Wilk 387.

There ~~is a~~ is another class of actions that stand upon a different ground. As when a man is deprived of votes, by the misconduct of another, for an honorable office. As should an officer refuse to receive legal votes. And this whether such appeal was the reason of the ~~vote~~ elections being lost or not. 2 Vent 25. Sh 19: 11 Co 99: 1 Vent 206.

By 8 Anne by stat action can allowed for making use of the inventions of others when they have obtained a patent. But to a recovery it is necessary to prove that the thing was new. It is also necessary that the specification be full & complete, so that when the patent has expired, the public may have the benefit of it.

It has been made a question whether before there was a man was entitled to his inventions. Before this Chancery had been in the practice of issuing injunctions against persons who were to proceed in them. Sc 4 Bac 2305.

This action of trespass upon the case will lie when a man suffers in his property, by ~~the~~ reason of another's improper execution of his office. And as the case may be, trespass or ~~in~~ action would lie.

When a man suffers by means of a Deputy, if the act was a tort, the action may be brought either against the principle or Deputy. As either against a Sheriff or Deputy. But the Sheriff in this case can not be rendered liable criminaliter, but civiliter.

To the rule that a man is liable for the acts of his Deputies there is but one exception. In the case of the post master General.

When the injury arises only from the neglect of the Deputy, the Sheriff is alone liable. — The reason for this rule is because the law does not know the Deputies as officers.

In Cos these actions have been brought against deputies, but always at their solicitations. Salk 18. & 1 Ld 175. Cowp 603

Of the action of Trespass upon the case for Escapes.

In order to the maintaining of this action, there must have been an arrest.

To constitute an arrest, as has been before observed, it is necessary that the party pursued should have been touched, unless he had submitted without.

When a man has been once taken, the Sheriff if he escapes from him may pursue him any where; no place in such cases, can afford him a sanctuary. 1 Sid 79. Hob 62.

To justify an arrest in all civil, & most criminal cases, there must be a warrant.

It is not absolutely necessary, either in civil or criminal cases that a man should have a warrant about him, to justify an arrest. ~~in civil cases.~~ If for instance a number should go in pursuit of a man, some party should go one way, & with the warrant, & another, another way; the party without a warrant would be justified in arresting. But if the warrant should not be got, but left at home, an officer cannot justify under it. Cowp 64.

If ~~a man escape~~ man whom the Sheriff is in pursuit of, should flee into a strangers house, the Sheriff would be justified in breaking the door. 5 Co 92. Cowp 1. Hob 62.

It has been made a question whether after breaking a door of a man's own house, & arresting him, whether the Sheriff is liable for a trespass vi et armis only, or whether the arrest was also illegal. — In Gansells case the court went into a long enquiry to ascertain whether the officer broke the outer, or inner door, in order to determine whether the arrest was void. This raises a strong presumption that it would be void.

Judge Nares is clearly of opinion that it would be a void arrest. For it is a well established principle that a man shall take no advantage of his own wrong.

The following case, which is much later than the above, puts the question beyond a doubt. When one broke a door, & another entered, the court determined that if the party arresting was privy to breaking, it was clearly a void arrest. Much more then should the wrong doer himself arrest. 5 Mod 825. 5 Co 93. Cowp 1. Hob 62.

The Sheriff's prisoner escapes upon final process, he is always liable: If upon mesne, after imprisonment, he is also liable: This action of trespass upon the case, as well as debt will lie even the escape is upon final process.

Escapes are of two kinds, voluntary & negligent.
Voluntary are by the express or implied consent of the keeper. Negligent escapes are when the prisoner escapes without his keepers knowledge.

If a prisoner is stopped by the Sheriff or his officers of the Jail, tho' ever so small a distance, the Sheriff is liable; whether he returns or not. 3 Blk Com 415: 2 Dunf 172. Cro 202.

When a man solicits a Sheriff to appoint a deputy for a particular purpose; the Shff is not liable to the solicitor, for any misconduct of such deputy. If he were to be made liable it would furnish the means of practising fraud upon him. 2 Dunf 120.

If a man has been committed upon a void process, the Sheriff is not liable for his escaping. But if the process was only erroneous, the Sheriff will be liable for an escape; and this altho' the judgement was afterwards reversed. 2 Dunf 126. Carth 1148.

It has been made a question whether when an action is brought upon a final process, the rule is to be the same as debt or trespass upon the case. In the following case it is laid down that the rule of damages is the same. —
Judge Rivis questions whether it is the same in all cases. When the debt is upon contract it certainly is.

When a person escapes upon mesne process, the action must be trespass upon the case.

A Sheriff is excused upon mesne process, for a rescue because it is not expected that he should take strength enough to resist any force that may overtake him. Co J. 412. Co Ll 878.

But if the rescue is on final he is liable at all events. 1 Rolle 108: 4 Co 84.

When a prisoner escapes, after being taken out of Jail by order of the Court, as upon Habeas Corpus; it affords no excuse to the Sheriff.

If an officer retakes a man, who has escaped thro' negligence, before an action is brought against him, he is not liable. 2 Will 295.

But if the Creditor chooses to ~~prosecute~~ the ~~Creditor~~ Debtor he may; & the Sheriff is thereby excused.

If a Creditor recovers the whole out of the Sheriff, he can recover no more out of the Debtor; for no man has a right to recover more than one full satisfaction. But if only a part is recovered out of the Sheriff, the ~~Creditor~~ Debtor is liable for the whole, so that what has been recovered out of the Sheriff, will be considered only as part money. — Bull NP 69. 3 Co 52. Co Ll 657. Sty 873.

A voluntary return of a Debtor, after a negligent escape, but a action brought, excuses the Sheriff. 2 Dunf 126.

If a man who has the liberty of the yard, escapes, but returns before action is brought; the Sheriff is not liable.
But if he escapes a second time, after the Sheriff is aware of the first, the Sheriff will be liable; for it was his duty after such information to confine him. 2 Will 294

A subsequent assent to an escape will not make it an escape with the consent of the Party & therefore they may have his action either against the Sheriff or escapee. Salk 271

A Sheriff may retake an escaper for his own benefit. This power does not stand upon the ground that he has actually been damnified; but of his liability to be.

If the Creditor should receive out of the Debtor, after the Sheriff had retaken; the Sheriff must refund. The Debtors action against the Sheriff in this case is for money had & received. 6 Bl 53.

In voluntary escapes, the Sheriff has no remedy against the Escaper. —

In Espinass Nisi prius it is said that the Sheriff might have an action for so much money laid out for the escapees use. — But there is a late & positive decision to the contrary of this. And this seems agreeable to principle: the object being to punish him for a breach of trust. Hand Report 1 Stg 680.

If a Sheriff makes a false return he is liable. 1 Str 65.

And so also if he makes none. 6 Bl 875.

Another class of cases to which Trespass upon the case lies, is in the case of Attorneys.

The cases laid down in the books where they are liable are: 1 For neglect. 2 For mismanagement. 3 For Corruption.

As to the first class of cases there is no doubt. The degree of neglect always appearing manifest. — As if an Attorney should suffer Judgement to go by default: or should neglect to deliver up a man to the Shff to be has surrendered himself up in court. Judge B. thinks he would be unnecessarily [illegible] appearance.

3d This class of cases — Corruption; is ~~always~~ equally clear.

2d It is that class of cases which comes under the head of mismanagement, that Gentleman so much pound for dispute. If a man manages to the best he is not in general liable. But if the mismanagement was such as to afford evidence of fraud or corruption; then Judge B. conceives he ought to be liable. Indeed he thinks that it is superfluous to enumerate this class; according to his ideas, they are all in fact comprehended under the other two. —

It does not follow that an attorney must be liable for the whole debt when he has lost his case. If the debt can be got out of the Debtor, then he will only be liable in damages. 4 Bur 2060.

Attorneys often appear for persons when they have no authority. This is also an offence for which they are liable in Damages.

In Eng they make no enquiry as to a mans power to appear; they always presume that he has been empowered. In Con they will enquire into it, if the opposite party requires. 1 Stk 86.

Another class of cases for which Trespass upon the case lies, is when men have certain Ministerial acts to perform

to do them. Lords. This class of cases are comprehended Justices so far as they are ministerial officers, as well as other persons. If therefore they should refuse to sup. writs, except when it is discretionary, or should mismanage in taking results of replevin, they would be liable. 2 Hawk 90.

So for injuries done by private persons. 1 Ld. Raym. 1 When there was a trust. 2 When there was none.

1st When there was a mutual bailment, the bailee is bound provided he was guilty of such a piece of gross negligence as is in contradiction of fraud. 1 Ld Ray 905. Com Dig 136. 2 Str 1099. 1 H Blk 108.

So is the case of carriers. These are of two kinds: Common & private.

Common carriers are those who make it a business to carry goods either by land, or sea. A man who does business or is to carry passengers, not goods, is not a common carrier. And if he should for once undertake to carry goods, he would be liable only as a private carrier.

As a general rule they are liable at all events, unless overtaken by the acts of God, sometimes called inevitable accident; or by the common enemies of the land. Co Lit 89. 1 Atk 143.

As to what is the act of God. When a boat was sunk by a sudden flaw of wind. — So also the mischief which comes to the throwing of goods over board at sea, is esteemed the act of God. As if a storm should arise. 1 Str 128.

As to the open enemies of the land &c. 2 Lev 69. 1 Mod 85.

If it was thro' the owners fault that the goods were lost, the common carrier is not liable. As if he should send a pipe of new wine, which should ferment & burst. Or if he should insist upon a carrier taking goods, when the carrier informed him that there was danger of the waggon breaking down. 2 [illegible] 127.

This strictness with regard to common carriers is grounded upon principles of policy.

In the following case there was no manner of fault in the carrier, yet he was liable. Viz. A rat gnawed a hole in the bottom of a ship, which let in water, & damaged the goods. 1 Salk 281. If the property was never properly in the hands of the carrier; as if a servant should go to his master, & keep charge of it, the carrier would not be liable. — If however the property was given to a sailor, the master would be liable, for he is his servant. East India Company vs Pouller.

If money is delivered to a carrier, and he is informed that there is only a certain sum, & he is paid for no more: he is not liable for more than [illegible] was stated to be. Carth 285

When a man delivered a carrier a small trunk, & upon his requesting to know what was in it, informed him that it contained 50 lbs, when in fact it was filled with bank bills; it was

Decided that the carrier was not liable for them.
And Lord Mansfield then gave it as his opinion, that a carrier was in no case liable for losses when he received. Bull NP 75.
Pinn v. Gibbons vs Painter. —
When goods are sent in proper Ships, both the master & owner are liable. 2 Str 690; 5 Burr 681.
It is always the Duty of the Common carrier to give notice to the consignee, when he is not to deliver them personally. If a letter is sent he must see that it is forwarded. If no post office, by some other method. 3 Bell 429.
The carrier is sometimes liable to the consignee & sometimes to the consignor. If they were sent by him, by the consignee's order then the action is in the consignee. If the consignee sent it without any order, then the action is in the consignor. Ven 2 600. Davis vs James.
As to the Boss in the generals cases, see a Spencer's review carrier. Str. 1 Str 17. Cowp 754.

By Inn Keepers liability. New Keepers & Tavern Keepers are the same in Connecticut.
They are answerable for the goods of their guests. ~~The~~ ~~Sed Qu in others.~~ ~~They are liable~~ ~~Persons not from~~ Not for a Freighter who has Deposited ~~Lies~~ Lies; in case it did, to charge them. 1 Co 32. He must not only be a guest, but he must be received as a guest. — The Inn Keeper in general is obliged to receive a guest. 5 Burr 276.
If goods were stolen by a mere companion the Inn Keeper is ~~Persons not~~ not liable.
The Inn Keeper is not liable for property unless it was in his own house, or stable, excepting the hired a horse is present of his own accord.
There are some contradictory reports as to the Inn Keepers liability, if he refuses to be liable unless the property is delivered to him. Mon 158. Cap Ni Pri —
If there is no proof there is no liability. As when goods are delivered to a tavern Keeper & the depositor goes elsewhere. If a man should deliver a horse & go elsewhere the tavern Keeper would be liable, for here proof does arise. Cro J. 188. Salk 388. If Inn Keepers refuse to entertain without some good excuse, they may be compelled to by by the constables.

Liens give rise to another action of Trespass upon the case when the must has been abused.
If a man holds a piece of property as a pledge, the law holds him liable to an ordinary degree of diligence. Salk 523
If a man discharges the debt for which the goods are held, & makes a tender, & the pledgee refuses to deliver it up, he then becomes liable at all events for the goods. Bull NP 72.
The pawnee may sometimes use the goods without any additional liability, either for the goods or use. Sometimes he becomes

liable for the loss only. & this sometimes for the use & the goods at all events.

When the goods would be better for use, as a cow, the pledgee is neither liable for the ~~loss~~ use, nor less ~~than~~ for than he would have been if he had made no use of them.

When the goods would neither be better nor worse for the ~~loss~~ use, he will only be liable for the loss, & this at all events. As per Willes.

When the goods are the worse for the use, then the pledgee is liable for the use, & the loss at all events.

The pledgee is in this case liable for the use whether the goods are injured or not. 2 Str 572.

Bailment for hire is another source of actions for trespass upon the case.

If ordinary care is used the hirer is not answerable.

If however a person who hires property exceeds the bailment, he is ~~not~~ liable, altho' he uses due diligence; not however to the extent of the pledge after the demand is tendered.

If a man for instance, should hire a horse to go a certain place, & he should exceed the bailment, & the horse should die, he would not be liable if the circumstances of the case were such as would make it probable that he would have died if he had not exceeded the bailment.

The difference between this case of hire & that of a pledge is this, the pledgee by refusing upon tender to deliver the property, is considered as doing a trespassing act, which divests the owner of the property: & thenceforth becomes completely his. & he is as much subject to the loss, as he would be for the loss of any of his own property.

Gratuitous Services, afford another ground for this action of Trespass upon the case.

When men undertake to do things gratis, & it is demonstrated thereby this under certain circumstances will maintain the Action of Trespass upon the case.

In cases of gratuitous keeping only ordinary diligence is required. 2 Bl Rep 915. Com R 34. 136.

When there is no trust, and injury arises to personal property, an action can be maintained.

The suing out of Commissions of Bankruptcy wrongly comes under this head. It does not come under malicious suits, nor of slander.

To support this action, there must be either wantonness, or ~~slander~~ malice. But if the suing of the Commission arose from a culpable degree of negligence, in misunderstanding the case, this action will lie.

Deceit in Sales, is another case which will support trespass upon the case. As if a man should warrant property to be of one quality, when it turned out to be a different from the statement. Yelv 20.

If a servant should warrant in the sale of his masters goods, the master would be liable; altho' he was not ordered so to do. 1 Ld Ray 289. 1 Str 283.

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(1) An action of ~~Deceit~~ deceit cannot be maintained against an infant. Ibid 258.

(2) It was brought & maintained for wilfully and maliciously suspending the defendant from his office without any sufficient ground.

Warranties do not extend to such defects as are obvious ~~[illegible]~~ If for instance, a man should warrant a horse to have four legs, when he had but three; or to have five eyes, when one was out, he would not be answerable upon the warranty. 1 Salk 211.

A warranty after the bargain is made, is of no avail; for there was no consideration to it.

A warranty made any time during the negotiating of the bargain, is binding; altho' the bargain was a month in agitation. But if a warranty was offered to be made at one time, & the bargain was totally broken up; and at some future time should be agreed, the former warranty would not be considered as operating to the present bargain. 1 Stra 414. As when a man at one time affirmed that a sword was silver mounted & demanded seven guineas, & at a future time upon its being again tendered, a bargain was concluded; he was not then liable upon the warranty. But would he not be upon a false affirmation?

If a man should sell a horse affirming him to be sound, and the purchaser should discover that he was not, & proceed to return ~~him~~ instead of returning him, & he should die in his hands; he could still recover the damages sustained by the deception. 1 H Blk 17. 3 Burr — Pasley vs Freeman.

If a man makes an affirmation with regard to property, whether fraudulently, or inadvertently, which is not founded in truth, he is liable.

Mere matter of opinion does not subject a man.

An affirmation with regard to the value of property, will however subject a man. As that such a man will give so much. 1 Salk 211. 2 Ld Ra 1118. 6 Js — Blk Com.

And so does the concealment of Defects. 3 Blk Com. Vendors masters however, if they use no arts to conceal defects, have never been considered liable for not divulging them.

In every sale there is an implied warranty that the seller is the owner of the goods disposed of. Bull N P 30. When a man is not the owner, it has been made a question, whether he is liable to an action by the vendee, till the vendee is damnified? The principle that the liability to be damnified, entitles to an action, governs here as well as in other cases. 6 Js 474. 1 Stg 63. 1 Salk 218. 6 Js 196.

The using of false weights & measures, or the making of false tokens, or signs is another ground for this action. Making use of false tokens & signs, is also an indictable offence. Mon 585.

When a man has in gambling been cheated by false cards, or dice, he may recover back. 6 Ll 90.

(1) ~~[illegible]~~

When a man pretending to be single, marries a woman, he is liable to this action. Bull N P 82.

The following is a noted case for the malicious use of power. 4 T Burr 538. —

As to the declaration, there is not in perhaps upon the case any particular form. It is only necessary to state the story just as it is. It is necessary to state the manner of

The injury. If, for instance, a man should bring an action for injury done his horse in overloading him; he must state that it was done by putting on such a quantity of [illegible].
Or H 164.

The general issue is not guilty. By Common Law any thing may be given in evidence under the general issue. ~~Cro H 412~~ ~~Strange~~ 172. —

Miscellaneous rules of Evidence

See Par. 167

When one Defendant in a joint action suffers judgement to go by default, & the other has pleaded, the Defendant who has suffered judgement by default is a good witness for the other Defendant who has pleaded. Hindes Hayes & Cantom 2 Leg Rep 552 per L. Ranger.

(1) Written evidence is the evidence derived from records, Deeds &c.

(2) A mere nominal legal interest does not exclude one from testifying. As when A granted to B for the use of C, B may be a witness; altho he may have the legal interest. But if B is a party he cannot be a witness. 1 Pl 287. 290.

An executor can be admitted to prove the sanity of his testator provided he is a bare trustee, but if he is entitled to the residuum he cannot. Douglas Goodtitle vs Willford.

A possible contingent interest does not exclude a witness. Example. A who is eighty years old, & apparently on his death bed, had a cause with B about land, C his only son may be admitted to testify, for his interest is only a possible contingent interest.

But if a person had a remainder in land to take effect one hundred years hence, in a suit about that land, he would not be admitted to testify. 1 Sk 283.

It is the certainty, not the quantum of interest, that excludes.

The rule which Lord Kenyon said that he was accustomed to separate minutely by mes, that no objection could be made to a witness on the ground of interest, unless he was directly interested in the event of the suit, & could avail himself of the verdict in the cause, & use it in evidence on any future occasion in support of his own interest. 7 Tr. 62.

Lord Hardwicke gave a solemn opinion with the majority of the judges "that the witness having administered under the first will, was agent to the Executor, & as Executor de son tort, & being liable to action, the objection went only to the credit, not to the competency. 12 Mod 112

It is established as a rule that where the matter is doubtful, the objection goes to the ~~competency~~ credit. M

It is established as a rule "that the question in a criminal prosecution being the same with that in a civil cause in which the witness was interested, went generally to the credit; unless the just. in the case in which he was ~~interested~~ a witness could be given in evidence in the case in which he was interested. M (See page 749 post (2)

Evidence

The general division of evidence is into Parole & Written. (1) See Page 705 (1) —

Under the head of Parole evidence depositions are included; for they are only Parole testimony written down.

All persons, excepting in one or two solitary cases, are ~~excluded~~ admitted to testify, excepting the following 1st Interested persons. 2d Those who stand in certain relations to the parties. 3d When they have become infamous by conviction of certain crimes. 4. For want of discretion — And also a few Anomalous cases.

1. Interested Persons

Persons excluded on account of interest, are those who are, 1st Directly interested in the event of the suit. 2. Those who are consequently interested. 3. Those who are interested neither directly nor consequently, in the question then on trial, but in the event of the ~~suit~~ question then on trial.

1. By being interested directly is meant, when a Judgment will favour by an execution for, or avoid ~~fraud~~ injury to, or against the party ~~suit~~ offered to testify.

They may likewise be interested directly by having a compensation for their acts in prosecuting the suit, as would be the case were a reward of ten pounds offered to any person who would convict another of perjury. 1 Stra 316.

2. When the present suit will lay a foundation for a future action in which the witness would be a party, he is said to be interested consequentially. 2 Stra 1026. 1 Burr 164.

A sells to B with warranty; C sues B in ejectment. Then A is not interested in this suit directly, but ~~then~~ he is consequentially, being liable to B, if C succeeds against him.

So whenever a Judgment can be made use of to found an action for or against the witness, or to furnish evidence for or against, he will be excluded.

A mere nominal interest, does not exclude. 1 Pth 287. 290. (2)

The case of an Executor not entitled to the residuum is an instance to this point. But this is contested. Doe ex d Goodtitle vs Wilford.

The principle on which exclusions are founded is interest not bias. The rule to exclude interested persons is most probably founded upon the presumption of bias. 1 Pth. 203.

When you can prove a man interested, it is not not necessary to appeal to him. When an appeal is made to a witness, an oath called a voir dire is administered. This oath requires that he shall answer truly all questions which are put to him, excepting such as have reference to the merits of the cause.

3. Men are also excluded from testifying on account of their being interested in the question. If several persons be interested in a ship which is lost, and an action is brought against one of them, the others will not be allowed to testify; because all their liabilities depend upon the same question, and a recovery against one, will decide a question which will entitle a recovery against the others; the this decision cannot be given in evidence. See (4) following page.

Does this go to the competency or the credit? It has been decided that it goes only to the credit. Before this decision there was much contradiction upon this point. 3 Dury 27.

It is necessary to look into the old law for those ideas received in Con & many of the States. But the national Courts have adopted the old idea. Those that were excluded, those that were admitted under the old law, often stood upon the same ground.

In Criminal cases such persons were always admitted. In civil cases, persons battered might always swear in a criminal prosecution for that battery. And so in all criminal cases, except, Usury, Perjury? Perjury. For these exceptions he knows of no sufficient reason. But he thinks that he has seen the following rule in the books, that whenever a man was convicted of usury or perjury the bond was forfeited, & delivered up to be cancelled. As to the case of perjury, the person interested in the question is excluded, because ~~the~~ he was formerly entitled to a sum of money. 2 Stra 1229. (1)

There ~~was~~ case where a man was admitted in usury because he had paid the money. 4 Bac 2257. There it was said that he was admitted because he was not then interested. But it is not true; for he could have an action & recover the money back.

There is an instance where a man who had been cheated was excluded. 1 Str 599. Salk 2[illegible]. 7 Mod 119.

In Civil cases, before the decision in 3 Dury 27. persons who were interested in the question were uniformly excluded.

If a witness believes himself interested even in honour to be a loser if the suit goes against one of the parties, he will be excluded. As if a number were jointly engaged in a piece of wrongdoing, & one of them only was prosecuted, here the others would feel themselves in honour bound to indemnify their companion; and so are therefore to be excluded. 1 Stra 129.

(1) In cases of perjury or usury it is now held that the party injured is a competent witness: in the case of forgery he is still incompetent. 2 Salk 282 (3) 1 Mr Nd 112.

(2) Yet so far the rule holds, being founded on a principle not to be suspended of necessary justice; that when a person is to discharge himself by such evidence as would affect a conviction of the party on his trial, he shall not be permitted to give evidence of a public prosecution. 1 Mr Na 54

Before such a person can be examined the Attorney General must file a Nolle prosequi. 55

In informations before magistrates or penal statutes, where the informer is entitled to the whole or a part of the penalty, he is an incompetent witness; perhaps made competent by stat; for indirectly interested in the event of the suit. Mr Na 60.

In an indictment or information on the stat of usury, the party to the usurious contract cannot be a witness while he hath an interest in the question, because that were to avoid his own security. Ib 60

When a warrant is issued by the royal proclamation, persons prosecuting in expiation of it are admissable. Ib 54

When the objection goes to the interest of a witness it affects his competency, where to his influence his credit. 107.

In order to show a witness interested, it is necessary to prove, that he must derive a certain benefit from the determination of the cause one way or another. Ib 123

(3) Mr Nally observes that the rule that excludes all persons who were parties to a suit in which perjury had been committed from testifying against the offender had been relaxed & numerous have cases in the establish the rule to be, that he will be admitted provided the suit in which the perjury

see following pg (3)

(1) The Pltffs Counsel may strike out any one of the Defts, & then comp[illegible] him for an evidence. Also if nothing is found against one of the Defts, the Court are at liberty to strike him out.

2) The rule as here laid down only applies to the case of an action brot by the person from whom the goods are stolen, upon a Connecticut Statute, to recover treble damages, which is a Civil action given by the Statute, & of course the person from whom the goods were stolen is Pltff & is interested, but by adjudications of Connecticut Courts he is admitted from the supposed necessity of the case to testify that the goods were taken without his permission. But this does not apply to criminal prosecutions; there he is admitted as Chief.

(3) Who committed is not depending at the time the testimony is called upon. 2 Mc Nal 107.

To repel the testimony of a witness who comes in to prove ~~his own hand to be~~ the instrument to be a forgery, it must appear that he would be liable to pay in case the signature was genuine. 122.

(4) It has been determined in the case of a broker on a policy of Insurance, that where a man makes himself interested, after one of the Parties has the interest in his testimony that he shall nevertheless be compelled to testify. 120 Clerk.

(5) The law, on grounds of public policy, does not permit husband & wife to give testimony which may convict & criminate each other. 2 Fa 268.

The objection is not confined to cases where the husband or wife are directly accused of a crime, but even in collateral cases, if their evidence tends that way it shall not be admitted. Id

(6) In misdemeanors persons indicted separately from the party on trial, is not indicted, though concerned in the transaction, are competent witnesses; & the same rule holds good in many species of civil actions, where the witnesses is not made a defendant. 1 Mc Fa 204

(7) Where a Husband permits his wife to act for him in any department of business, her admissions or acknowledgements are evidence against the husband. Emerson vs Slander 1 Sup Ct 142. 1 Fa 527

The wife confession of a trespass committed by her could not be given in evidence to affect the husband in an action in wh he is liable for the damages & costs. 7 Fa 113

This interest which excludes is confined to pecuniary interest. A mans honour being at stake does not excuse him. For by it is a point of honour amongst Sea captains, not to desert their convoys: if an action should be brought against an insurer, he should plead desertion of the convoy, and should call upon the captain to substantiate his plea; the captains excuse that he was in honour interested would be no excuse.

When an action depends upon Deps than one they cannot swear each other clear, or be witnesses for each other, altho many actions against joint Defendants may be severed. This is said to be founded on the principle of interest, it proceeds on the principle of their getting costs provided they swear each other clear. (1) Bull NP 286. 1 Stra 533.

(7)(5) Husbands & Wives cannot be witnesses for nor against each other, either in civil or criminal cases; excepting in the case where a wife was employed as an agent, and had made declarations about the business out of Court, in this case these declarations were allowed to be proved.

A wife will not be allowed to swear even with the consent of both of the parties & of the husband; but the husband is to be permitted to swear with the consent of the parties.

A Jew man may, with the consent of the opposite party, be a witness against himself.

After you have proved a man not interested in this suit dies you cannot introduce other testimony to prove that he is.

To the Rule that a vested interest tho never so small excludes, there are the following exceptions.

When two are joint trespassers, & only one is sued. Now a recovery against one bars a recovery against the other, yet the others are admitted.

This is founded upon the reason that it would be difficult to prove trespasses without it.

The second exception is in the case of book debt. This is made by Stat. Then the Pltff & Deft are both admitted as witnesses.

Another case is, when a man has been robbed, & sues the hundred. This is founded upon necessity. (And for the same reason a man may swear that his goods were stolen, tho not who took them 2) Bull NP 289.

So also, & for the same reason a second person is admitted to swear in an action for the recovery of his by giving it upon the recovery he releases himself from the debt. 3 Stk 690. (3)

Also in an action for an escape, the escaper will be admitted to swear that the escape was voluntary in the Sheriff.

Scouts who have been employed to do certain acts, as to pay money &c are admitted to prove that they executed their charge. Bull NP 289: 1 Stra 647: 3 Will 20.

If a person who had been a witness, afterwards becomes interested; he cannot thereby deprive the party who summoned him, from the benefit of his testimony.
If therefore a man is a subscribing witness, & afterwards becomes interested, he can be compelled to swear notwithstanding
3 Dany 27 a 37.

If a man who is interested, has a release given him, he becomes competent. If for instance, a legatee is examined as a witness he will be admitted upon releasing his legacy.
2 Stk 691.

In an action of adultery a man is not admitted to show he was not bailiff or reeve, but after that is proved he may be admitted. This on the ground of a presumed confidence between them.

2. Those excluded by reason of standing in some relation to the parties.

There are notes of consanguinity that can exclude (1) Attorneys, & persons acting as counsel in a court of justice are not witnesses to swear any thing that they got from their client, while officiating as Attorney. Yet to information which they obtained from any other source, while not officiating as Attorney may be compelled to divulge it.
Stra 1 p 204. Comp 845. (2) 1 McNal 240

Nor is the Attorney obliged to furnish any paper which he obtained from his client.

But if the client has written papers thro' any trick, and will not produce them, the Court will admit every thing that the opposite party states that they contain. 3 Burr 1667.

This restriction upon Attorneys communicating information received from their clients, applies to all future suits of the same case, whether they are claimed or not.
2 Dany 431.

These rules are strictly confined to Attorneys, & not to other confidents. 4 Dunf 473. & 753

Counsel, of a different description, than one who is actually an Attorney or counsellor, are excluded.

Husband & Wife as a general rule are not admitted to testify for, or against each other. But to this rule there are exceptions. 4 Dany 670.

In Case of treason they can be compelled to do so.
At Lear this is the received opinion, but Judge Burrows questions it 2 Mayl. H Stk 452. admissibility in Com. v. Hare P.

There are some cases where the wife is made a witness. 4 Dy.

In Case of Bankruptcy, the wife may be compelled to disclose as to the husbands effects. This is by Stat.
When the wife has been compelled into marriage, she may swear against the husband. But this is not properly an exception, for she never in fact was married; consent being necessary to the completion of any contract. 1 Stk 488.

(1) Either at Com Law or by Stat. But by the civil Law there is.

(2) Lord Kenyon. The difference is, whether the communication was made by the Client to his Attorney in confidence, as instructions for conducting his cause, or mere parte dictum. The former was not in this instance the case; on the contrary, the purpose in view had been already obtained; & what was said by the client was in contradiction to his Attorney for having obtained his suit. 1 Mc Na 246.

The Clerk attending on a Grand Jury should not be allowed to reveal that which ~~paper~~ was given in evidence before the inquest. The jurors themselves being sworn to keep secret all that passes before them. 233.

(1) A conviction upon a charge of perjury is not sufficient, unless followed by judgment; I know of no case where a conviction alone has been an objection, because upon a motion in arrest of judgment, the conviction may be quashed. 3 Comyn's D. 5. 1 Ma. Ind. 211.

The conviction of a defendant on a charge of an infamous nature, does not complete incompetency. To consummate that incapacity, judgment must follow; but execution thereof is not necessary. 1 Ma. Ind. 2.

Whether a wife may be admitted to swear, when her husband is arraigned upon an indictment for abuse of her, remains undetermined. The books are contradictory upon this point. Reason strongly demands that she should be admitted. Hutton 116. 1 Stra 633. Burrow. between 500 & 600.

When they swear the peace against each other they are of course admitted.

What the husband, or any other person has said against himself, will be evidence against him. But as a general rule, what the wife has said against the husband, will not be admitted. In this case there are exceptions. When the wife made conveyances as to some private affairs which she had to manage, they were allowed to be proved in an action against the husband. 1 Stra 504. 527.

3d. Of persons who are excluded on account of Infamy. Infamy can only be proved by a record of court. 2 Stk 461.

The crime must be one in Felse. It must be one which will go to prove, according to the general ideas of mankind, a person destitute of integrity. Theft, Forgery &c are crimes which evince a destitution of integrity. But a tortious disposition is not incompatable with integrity. Co Lit 6.

It is said down in some of the books that he must have suffered an infamous punishment. But this idea is exploded. It depends upon the infamy of the crime & not of the punishment. Bull NP 247. 1 Stk 66. 2 Hob 8 G. (1)

It has been held in Eng that pardon restores a man to his credibility. But this seems to be against principle, for it is not the punishment, but the depravity that excludes him. It has also been so held in some of the U S States. This rule must be understood with this distinction. That when the exclusion is a part of the offence by stat, then the pardon does not restore him. But if a consequence of the crime then it restores him. ~~But this distinction is nonsensical.~~ 2 Hawk 550. 610. Mc Nal 236.

When the pardon is by act of parliament it restores in all cases. Winfer purges every stain.

In Con we have a practice of restoring persons after long, & continued good conduct. This power is discretionary with the Court. 2 Stk 461. perhaps 14 or 15 years would be sufficient.

Joint trespassers, or partners in crimes are admitted to swear against each other. Comp 197. 2 Hawk 434.

Atheists, or persons professing so to be, are excluded from testifying. Bull NP 292.

In Eng Judge R thinks they go further, & exclude certain religious tenants. But we do not. Leach Cro La 368.

The law as it formerly stood excluded every person

who would not take the Jy oath, excepting Jews. The Jy oath requires that they swear by the holy evangelists & the New Testament. The Jews were admitted upon swearing on the old Testament. — Now they will admit them to testify upon swearing by their own religion, & the everliving God. 2 Str 1004. 1 Atk 21.

The oath only requires that a man should swear by the ever living god. And in so this New England. Previous to the above cases, none but those who would swear by the Testaments, ~~& the everliving~~ were admitted. (1)

4. Of those who are excluded for want of discretion.

As to Idiots, Lunatics &c there can be no question. Lunatics in lucid intervals are admitted.

As to persons who are commonly called strange, of strange imaginations &c they are most usually admitted, it is left to the Jury to weigh the testimony.

As to children, each case must be decided by its peculiar circumstances. When they have arrived at years of discretion, that is 12. or 14. years they are admitted of course. As to the cases between 12 or 14 and 5 or 6, they will depend upon the degree of discretion. Bull NP 293. Str 700.

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(6) You can put no questions to them excepting on their voir dire, & with regard to their principles, what concern themselves, previous to their being sworn. (3) (5)

Quakers are admitted in Jy & in this Country under particular Statutes. But in Jy they cannot be admitted to testify against criminals. (2) Cowp 382. In cases that are partly civil, & partly criminal they are admitted. Cowp 300: 2 Sydenfin 6.

In examining witnesses, you cannot as a general rule, ask them questions which will criminate themselves. This must be understood to extend only to such questions, as would of him, subject the witness to a prosecution. His affecting his reputation will not excuse him from answering. 4 Burr 440. (4)

The witnesses must testify from memory, but it is proper not for them to be supposed to refresh their memories by notes. The rule of distinction is this. If a witness writes at the time ~~It is a general rule in Court~~ to notes in order to refresh his mind as to dates he is allowed. But if he does not recollect the facts, but is willing to swear from his writing, he is not allowed. 3 Burr 749.

It is a general rule in Courts of law in Jy, that the witnesses must be present in court, & testify viva voce. But in Chancery their testimony is taken down by a minuter and it appears before the Court in form of Depositions.

(1) ~~A~~ by Excommunication by the Ecclesiastical court, is a ground for exclusion.
(2) Upon the principles of the common Law witnesses on the part of the criminal were not sworn. This was altered by a Stat of Wm.
In this County a rather in Con Quakers are allowed to testify in criminal cases upon an affirmation.
3) Kissing the book has been dispensed with in the by Courts. Cowp 300: 2 Lid 6.
(4) If a Crime has been barred by the Stat of Limitations they may be compelled to swear. 4 Term 440.

But it has been determined that where a witness had received a pardon from the crown that he could not be compelled to answer any question relating to the crime which would criminate himself. 1 W Ma 256. A man cannot be impeached but where he may answer for it; a pardon puts him in Statu Quo, & he is not to depose or accuse himself. 256

But where a witness has been convicted of an infamous crime, & has suffered the execution of the Sent.t, he may be questioned as to that fact. 258.

(5) Mylle says, that ~~in an indictment for perjury in~~ the proper question to be asked a witness in order to prove an objection to his competency, is not whether he believes in Jesus Christ, or the holy scriptures, but whether he believes in God, & a future state of rewards & punishments. 260.

(6) It was formerly the law that a man should not be allowed to impeach an instrument which he had given credit to by his own signature. This rule was afterwards restricted to negotiable instruments, & since in England has been entirely exploded. In the Congress Court of St. Cy. the English rule has been adopted. But in the Supreme Court of this ~~Dty~~ State it ~~only~~ still extends to negotiable papers. 1 Wm Nat 123.

(1) To the taking of the Deposition of both, the party.
(2) If a person lives within 100 Miles of the National Court he must be brought; if further his Deposition may be taken.
(3) If the party recovers, or returns before the trial the Deposition cannot be used.
(4) In order to bring an action against a witness for consequential Damages resulting from his absence he must be called in Court.

To the rule that testimony must be vica voca there are exceptions.
When the Court have ordered depositions to be taken, in order to perpetuate testimony, they will admit them, if the party deposing is dead. 1 Atk 445. 2 Atk 420.
So also when a witness is absent, & cannot be made to appear in court. Bull NP 239.
So also when witnesses have been summoned, and are prevented from appearing by reason of sickness.
A Deposition may also be produced, when a witness has given one, & afterwards swears differently vica voca. Bul NP 240.
The rules in Eqn are the same in a Court of Chancery as of Law; being vica voca in both.
In Criminal Causes depositions are never allowed to be read.
Depositions may be taken in Eqn if the witness does not live within twenty miles. But they may be compelled to come if the parties insist upon it.
(2) The federal Court have adopted the same rule as to admitting testimony vica voca as we have in Eqn & Chancery.
If the opposite party or his Attorney lives within twenty miles, you must notify them, that they may attend. (1)
If the witness is sick, or is going to sea, or a journey, you may take his deposition, tho he is within twenty miles. (3)
It must never be drawn by the party agent or Attorney, who is to use the deposition.

Of Procuring Witnesses

For the procuring of witnesses a subpoena issues. This is a summons signed by lawful authority. This office is usually a justice, or a Clerk of the Court.
Before a witness can be compelled to come, he must be tendered the lawful fees.
If a witness will not come after a subpoena & tender, an Attachment may be taken out to compel him. He has likewise rendered himself liable to an ~~attachment~~ action for all the damages which the party has sustained by his staying.
When motions are made for the adjournment of causes for absence of witnesses, it is the practice in Eqy for the parties to ~~swear~~ an affidavit of what he believes & expects the witness to swear.
In Eqn our practice is to produce the best evidence of the fact which can be procured, or to trust to appearances.
When a witness is summoned to compel him to come you must tender him what the law allows for his fees.
If the witness does not come upon summons he is punishable for contempt; but this is not usually inflicted. (4)

Of The Best Evidence &c

It is a rule of evidence that the best evidence must be produced that the nature of the case will admit of. That is the best that that case will admit of. It must never appear to the Court, that there is better or higher evidence than what is produced. If for instance, there is written evidence, they will not admit parole. For this reason subscribing witnesses must be produced, if in being; no sufficient reason appears for not producing them. Bull NP 294. (1)

It is also a general rule, that no parole proof can be admitted to alter, vary, or add to a written agreement. This rule proceeds upon the presumption, that when parties reduce agreements to writing, they comprehend in it every thing that passed between them. 3 Will 275.

You cannot produce a copy of a writing if the original can be procured; for the copy is not the best evidence that the case will admit of. But if the original is lost, or destroyed by accident, the copy may be produced.

If loss ensues from neglect, it proves. 4 Bur 2488.

When the original cannot be procured, a copy will suffice. As in the case of records: a copy of them certified by the clerk will be received.

It is laid down generally, that hearsay evidence is not admissable; that is what Stanyan have said. To this rule there are exceptions. — This rule is founded on two reasons; first The witness is required to be on oath, but the ~~testimony~~ words of the first ~~witness~~ strangers were not delivered on oath; second. The best evidence which the case admits of is required; therefore the one who made the assertion should be produced.

The exceptions are. 1st If the witness has before told a different story, you may prove what he said in order to impeach his testimony.

2. You may introduce what he has before said in order to corroborate his testimony. — In the books it is found laid down that you can, & that you cannot prove former assertions in this case. Judge Reeves thinks you may only produce such assertions, when the truth of the testimony is questioned.

3. Assertions of a party which are against himself may be proved. It is said that you cannot prove what a party has said in his own favor. This must be understood to extend only to conversations which are altogether distinct. All that was said at one conversation may be proved, as well for as against the party making them, and it will all rest upon its probability.

(1) Next as to the dispensing with strict rules of evidence, such evidence is to be admitted as the necessity of the case will allow of: as for instance a marriage at Stretton certified under the seal of the minister there, & of the town that they cohabited for two years together as man & wife, was not sufficient proof that they were married.
E. J. 541. 1 Wm. Pla. 87.

The first & most general rule in relation to evidence is this, that a presumption must produce the strongest evidence that the nature of the case admits of. Wm. Hal. 34[illegible]

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The general rule extends as well to persons who are now dead as those who are living.

What a man who is now dead swore in a Court of Justice, may as a general rule be proved.

The declarations of men in the following cases may be proved; tho they were not under oath.

1. When they were declared in contemplation of death.

2. When a question of legitimacy arises, what the parents who are now dead, have been heard to say respecting their marriage was is admissable. Comp 574.

3. In Cases of pedigree. ~~[illegible]~~ what family a man belongs, the opinion of persons who are now dead may be proved. Bull NP 295.

4. General opinions of mankind, with regard to the death of a man who is supposed to be dead. The family's swearing that the report & belief or general opinion is that he is dead. Bull NP 294.

5. The declarations of a pauper who is dead, with regard to the place where he belongs, will be admitted after his death. 3 Dun 715.

6. What people who are now dead, have said with regard to the boundaries of lands. This is very frequent.

7. When a question arises about a man's general ~~general~~ character for truth. In this enquiry the witnesses will not be allowed to mention their opinion; nor particular instances, marked with a breach of veracity; but the general opinion of mankind. Bull NP 296.

A man will not be permitted to impeach his own witness. This rule does not mean that you cannot prove facts diverse from what they have sworn. Bull NP 296.

In every issue it is the affirmative ~~and~~ must prove his side. That is to say a party cannot be compelled to prove a negative. — This rule ~~also~~ does not mean that you can not prove a negative inconsistent with the affirmative. As that A, who is charged with stealing a horse, was 50 miles off at the time of the theft.

It is frequently said that positive testimony outweighs negative. If in for instance was to assert that a man committed an act, & another that he did not, the positive testimony would prevail. But this rule is not true to that extent; it will depend upon the circumstances.

It has been before observed, that parole testimony cannot be introduced to make a written instrument appear different from what its imports on the face of it. —

There are two kinds of ambiguity; Ambiguitas Latens & Ambiguitas

The one is when it is clear ~~[illegible]~~ on the face of the instrument, but is inconsistable with some extrinsic circumstances.

As was the case when a man devised his Manor of Dale, & had two Manors of Dale; in this case parole testimony was admitted to prove which he meant.
And so also when a man devised to a charity school, & there were two charity schools.
The other kind of ambiguity, is when the term is equivocal on the face of the instrument; not a sentence, but a term, that is sometimes understood one way, & sometimes another.
As when a man gave his estate to his brother, upon condition that he would pay his debts. This gift does not convey more than a life estate; and his debts are in value double a life estate. Parole proof may be introduced to prove that he meant a fee simple.
And if a man under an construction has given away the thirds as much as he is worth, & under another only the amount of his estate, the second construction will prevail.
Parole proof may be introduced to rebut an equity. Certain agreements, or contracts of a written nature, have received a construction in Equity different from the construction in Law; parole proof may be introduced to rebut this equity. For example. If a man devises land in trust for the payment of debts, the residue in law belongs to that trustee, but in equity it shall go to the heir. Parole proof may be introduced to prove that it was the intention of the testator, that the trustee should have it. But a legal construction can never be rebutted by parole proof. But the demonstration of a right in Equity may be proved by parole.

(1) The subs of widow are the same in Contr law & Equity. Mc Nat 345.

Miscellaneous Rules on Evidence

It is a general rule, that when it is necessary to prove that a person is in a public office or capacity, it is sufficient to show that they acted upon the occasion as officers in their respective offices & capacities without producing the written instrument by which they were severally appointed. Pr. Pal 483.

The constitution of the office is private, therefore not necessary for the Plff to prove; & as against the Deft his acting will be sufficient. 486

The Court will not allow the father or mother to give testimony that their child who was born in wedlock is illegitimate. This is a rule founded on decency, morality & policy. L^D Raym 1095 & 5 G4.

This was a feigned issue out of Chancery, to ascertain whether the Plff's wife had been guilty of adultery. The man with whom she was charged to have committed the offence was called by the Deft as a witness & objected to by the Plff. Judge Livingston said that the objection did not touch his competency, he further observed, that if witness himself had objected to being sworn he should not have compelled him to, providing his testimony would subject him to a suit from the Plaintiff. John Doe ex Richard Roe. Jany. Sittings 1806. At the same Circuit another witness was called & objected to on the ground that he was under an honorable, tho' not a legal engagement to pay costs; this objection was overruled. Golden & Pendleton 7 Cowen.

In Monroe ex Twistleton, which was a qest for board & L^d allowance, it was held that a wife should not reveal matters of confidence imparted to her by her husband. Peake L 174. Appendix 44. Ex 1004 — 6 East 192

The opinion of medical men upon the state of a person's health is good evidence from the nature of the case. 6 East 144.

(1) Municipal Law is defined to be a rule of civil conduct, prescribed by the supreme power in the State, commanding what is right, & prohibiting what is wrong. A principle therefore of municipal Law is the redress of any privation or injury of right, or what amounts to the same thing a remedy for any wrong, for any wrong is a privation of right, & therefore the privation of right is divided into private & public wrongs, both of which in some cases arise from the same act. A private wrong is the privation of the right of an individual. Civil Injuries, together with the Methods of redressing them, will be the subject of disquisitions under the title of private wrongs. A species of wrongs called Slander, which will first be considered.

A precise definition of Slander is not to be found in the books, the following however is presumed to be an accurate one. viz Slander is the false & malicious defaming any person by words either written or spoken, which have a tendency to injure him, either in his personal capacity, his connections, profession, office, or in his trade. 3 Bl 125: 5 Co 125. Lep 496. 2 Co 14.

As to the general ground of objection to the evidence as hearsay; it is in many days experience in actions of Slander & Battery that what a man has said of himself to his surgeon is evidence to show what he suffered by reason of the ~~[illegible]~~ battery. 6 East 190

A witness objected to the answering a question on the ground that the answer might subject him to the payment of a sum of money. L.d Kenyon — said, that generally a witness being subjected to a civil suit, in consequence of an answer to a question put to him would not excuse him in refusing to answer, as the Statute was rather confined to a ~~[illegible]~~ criminal one. That a witness should not be asked a question which might charge himself obliquely by his answer, where there could be otherwise no direct evidence to charge him in a charge against him. 1 Esp Rep 411. Contra Stokes Law Ev.

Gibbs of Counsel for the Defd. insisted, that the witness being served with a subpoena Duces tecum was obliged to produce every paper in his possession, as no that paper did not criminate himself. Lord Kenyon denied that proposition, & said, that they could not compel the witness to produce the warrant of Atty. If that was the case, every man would be obliged to produce every paper in his Custody. It would occasion the ruin of millions. His Lordship then told the witness that he would not compel him to produce the warrant of Attorney, but that he might do as he pleased. Vide 2 Dawson 1 Esp Rep 405.

See Ante page 793 for further Miscellaneous Notes. —

(1) The Stat is not evidence of a private act, but it must be certified by the proper officer; in Eng by the Secretary of State. Hob 272. Cro Js 112.

2. In the case of the King v Sterling a person was admitted to prove that the name signed to an instrument purporting to be his will. ~~Fair v Weifein~~ in Pr Ma 439

(3) ~~In Hiscox~~ The general doctrine is recognized in a case mentioned in Maccally, that in all Courts of concurrent jurisdiction, their acts, however wrong they are, yet while they remain in force, are conclusive upon every other court; the cases of ecclesiastical sentences, & many others, were there mentioned. Ult. Rad. 435.

The Chief Justice C.B. delivered the unanimous opinion of the judges. What was here said at the bar is certainly true, as a general principle, that a transaction between two parties in a judicial proceeding, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal to a judgment he might think erroneous, & therefore the deposition of witnesses in another cause, in proof of a fact, the verdict of a jury finding the fact, & the jud.t of the Court upon the fact found, although evidence of the parties & all claiming under them, are not in general to be used to the prejudice of strangers. There are some exceptions to this general rule. M' Na

484 From the variety of cases relating to jud.ts being given in evidence in civil suits, these two deductions seem to follow, as generally true; First, that the jud.t of a court of concurrent jurisdiction directly upon the point, is a bar, or evidence conclusive between the same parties, upon the same matter directly in question in another Court. Secondly, that the jud.t of ~~exclusive~~ exclusive jurisdiction directly upon the fact

Written Evidence

Some things can only be proved by written evidence. As a right that you cannot obtain otherwise than by writing, cannot be proved by parole evidence. As a judgement, a title to land &c.

If you have written evidence of a contract you cannot produce parole; for written is of an higher nature.

But there are some things which the law makes it a man's duty to have recorded, yet if they are not, ~~it~~ may be proved by parole evidence. As that a man should have the birth of his children recorded, or his marriage.

Written evidence is divided into 1st Public Records. 2d Public Matters not of record. 3d Private ~~matters~~ not of ~~records, or records~~ records belonging to individuals, as Notes, Bonds &c

1st There are the public Acts of a Legislature, & the Records of a Court of Justice. (2) (3)

Acts of a legislature are public & private. As an act relating to all mechanics, is a public act; one relating to shoe makers is a private. One relating to all persons who serve writs is a public act; but an act concerning constables is a private act. Bull NP 222.

The difference between them is this, Courts are obliged to take notice of public acts without pleading them: But private acts must be pleaded for courts can not suppose to be acquainted with them. Hob 272. Co. Jr 112. (1)

There is one set of cases where both acts must be plead. Viz Wherever there is any law making void any security for money; as in the case of usury; here you must plead that the contract is usurious, & the stat upon the subject. Bull NP 224.

A verdict which has been given cannot be produced in evidence, unless between the same parties & point. If it was between another & one of the present parties it cannot be produced. If it was upon a different point it cannot be produced even tho it be between the same parties. Stra 68. Bull 232.

2d As to records you can procure only a copy. A copy thereof, signed by the persons required by law, is sufficient. The copies cannot be controverted. But if there was no record, you may plead that fact. To prove that there is such a record as proves, you must produce them if they are to be procured, or you must apply to the Clerk to

Certify the same. If he refuses the Court will compel him. Co Lit 117.

The copy must be certified by the Clerk in his official capacity. If another person takes a copy, he must swear to the correctness of it. Bull NP 229.

3. Private Documents are evidences of rights, Parol proof cannot be admitted in their stead. These as has been before observed are Deeds, Bonds, Notes &c. To prove the signing you must produce the subscribing witnesses. If they are dead testimony must be introduced to prove their hand writing. 10 Co 93. Stra 833. Also by strangers may prove its execution.

And so also if one of the witnesses has become infamous.

If the Deed is forty years old there can be no proof about it; the execution is presumed.

When a Deed is required to be recorded, as in Con, the copy of the record is evidence in all cases, except as between the parties; unless when it is challenged as a forgery.

It is said that the delivery as well as the execution must be proved. But the fact of having the Deed in possession is sufficient evidence of delivery.

It has been already observed that whatever a man confesses, is evidence against himself. This confession may be proved by writing.

Affidavits are testimony against a man (1)

Execution of a Deed may be proved by comparison of hands. But it was formerly held that a forgery could not be so proved. Gilbert says that this only raises a presumption of guilt; & as the law presumes innocence the presumptions must cack other. But the rule of evidence is now the same in one case as in the other. Bull NP 232.

Of The number of Witnesses.

By the civil law whenever a set of facts depended ~~upon~~ upon the testimony of witnesses, there must be two.

In Eng they do not in general require any specific number, all that they look to is the degree of credibility, that ~~they~~ ought to be given to them.

To this rule there are two exceptions. In the case of Treason two witnesses are required; to the same overt act ~~to substantiate it~~ however one is sufficient, if the two can swear to two different ones. (2)

(1) A man's confessions are sometimes drawn from his writings. The bills a man files in Chancery are evidence against him. And the answers filed are evidence against such party.

(2) The other exception is in the case of perjury. There two witnesses are required; one to rebut the testimony of the criminal & the other to prove him guilty.

(3) Point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court.

But neither the jud. of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument by the judgment. 1 Ph Ev 454

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(1) In civil cases, the court will force parties to produce evidence, which may prove against themselves; or leave the refusal to do it, after proper notice, as a strong presumption to the jury.
The Court will do it in many cases, under particular circumstances, by rule before the trial; especially if the party applies for a favour. But in criminal or penal cases, the defendant is never forced to produce any evidence; though he should hold it in his hand in court. Mc Nal 347.

In Con the Stat requires two witnesses to what is op- ~~ident~~ in Capital cases. This must not be understood to mean that the witnesses must swear to the fact, but ~~or other~~ if they swear to the circumstances it is sufficient. — If one should swear directly to a fact, & there were no corrob- orating circumstances, it would not be sufficient.

Of Presumptive proof

Presumption proof is that which is not directly to the point in question, but to circumstances that impel the mind to a belief.

Presumptions are violent, probable & light.

Writers say that a presumption which is to convict should be violent.

It is presumed in law that a man who has been absent seven years without being heard of is dead. And his wife is at liberty to marry.

Payment of a ~~[illegible]~~ is presumed after twenty years, & courts have even presumed it in eighteen.

In Con we have a Stat Limitat in respecting which extends to seventeen years.

The Con law presumption may be rebutted.

Interested Persons.

Of ~~the members of a corporation~~.

(1) As a general rule they cannot be admitted as witnesses in cases where the corporation is a party. 2 Lewins 231

In Con they are admitted, excepting it is a transaction of such a kind as that proof can be acquired as well from other sources. ie Members of a Corporation can.

If the agent of a ~~[illegible]~~ poration if a member he is excluded even in Con. But there seems to be no reason for this exception.

If a person has sold land with warranty, he cannot be produced as a witness in questions respecting the title. — But if he sets it by quit claim he can. The reason of this difference is that at the time that this law was made, a quit claim vendor could not be rendered liable to convey the fee of the title. But at present he is. As the reason of the rule has ceased, the rule itself ought to be abolished. Stu 445.

An agent, who is liable over if he does not pay the money, is admitted to prove the execution of his trust. — And if he in the immediate pursuit of your business, so conducts as to

Of Bail.

under ~~you~~ the principle liable, he may be produced as a witness altho' liable over.

A bail who is a subscribing witness may be com to swear against his own interest. Stra 406.

If a man would produce his bail as a witness, he must charge him. Hardwh 133. 3 Bac 1244.

No man can confess against another, tho he can against himself. But if they are all charged at once, it may be produced, but the Jury must only consider it against the confessor.

Of Bail in civil Cases.

If a mans body is taken to answer Judgments, the Law allows him ~~bail~~ his liberty upon procuring bail. This bail bond goes to answer the Judgment, and is given to the Sheriff. It is given to him because he was accidentally made answerable at all events if the bond was insufficient. But now he may give it to the creditor, and he is not answerable unless he injudiciously took a feasible bond.

This bond is not forfeited in the Deft not appearing at the Day. If he answers the Judgment by payment, or a render of his body at any time during the life of the execution his ~~body~~ bond is saved. This is the Usle in Connecticut.

But in Eng & most of the states if he answers upon a Scire facias against the bail, & pays the costs, the bail is excused. If the debtor is delivered up in Court, then special bail may be given, & this is delivered to the Creditor. This is not taken in the name of the Sheriff, but of the Creditor.

The receiving of bail in these cases is now a matter of grace with the Shff as is the receiving of bail for the liberty of the gaol after Confinement upon execution.

If the bail was considered at the time it was taken as of so responsible a nature, that no reasonable man would have refused it, the Shff is not liable in case it fails.

The bondsman has a right to confine the person whom he bails at his pleasure. If he escapes he may retake him without any [illegible]. But in many of the States it is the practice for the bail to carry with him in the pursuit a writing called a bail piece, for evidence that he is the bail. — In Con they usually get a certificate from the proper office.

The non est inventus in Con is conclusive evidence against the bail, unless some fraud was used in procuring it.

The Scire facias issues after the Shff returns a non est.

(1) By bail is meant that person, or those persons who give bonds that one attached shall be delivered up in Court.
(2) It has been determined that a bail bond is not negotiable; it was formerly a question whether it could not be prosecuted in the Creditors name.
(3) In by a ninth cousin has been objected to.

Of Juries

inventus. After this return in Com the bail becomes liable.
(2) But there must be no fraud or trick in this return. He must not improperly take advantage of an opportunity when he knows that he cannot be found, or is not at home.

If a Shff shall refuse proper bail an action would lie against him. What this action shall be is made a question. Some contend that Trespass or Ct Armis is the proper action; others that Trespass on the case is. It has been decided that the latter is the proper action. Co Ch 14.

There is another sort of bail which is required when an appeal is made. Bonds in such case must be given by the appealing party. - This bond is not to answer the amount of the judgement that may be obtained against him in the Superior Court, but to answer all the antecedent & subsequent costs. -

If a non est inventus is returned as to property, tho' not as to body, yet the bail is answerable for costs.
This bond is commonly called an appellate bond.

If a recovery is had in a lower court: and an appeal is made, bond must be given. If an appeal is properly made the Pltff is bound from resorting again to the judgement of the lower court. That is done over. If the appellant does not go in & prosecute the appeal, the bond is answerable for the amount of the lower judgement. (1)

A person who gives bonds on an appeal has no control over the person of the debtor.

Of Juries

(1) Each state has its own method of procuring Jurors. There are Statutes in each of them directing the manner.

In Con they are procured by drawing them from a box, in which their names were put after a Choice had been made. They are chosen by the Justices, Selectmen, Jurors, & Constables.

If the parties have any objections to the Jury summoned they may object.

It follows as a consequence from this method that we cannot have such challenges to the whole array, on account of the partiality of the Sheriff as they have in Eng.

You may have challenges to the poles or individuals.
The challenges to the poles which the Court must accept are, of Relationship. In Eng, according to Judge Kent's opinion, any degree of relationship is sufficient objection. (2) In Con the practice is not to go beyond first cousins.

2. Any degree of interest in the case or question. 3. If he has formed an opinion upon the question (?) Having been an Arbitrator would thereon exclude.

There are many cases where it is not a matter of Course, but of discretion. As in case of friendship between the Juror & one of the Parties; or a law suit; or any uneasy feelings towards each other. A great degree of intimacy is sometimes considered as sufficient. Also relationship that does not fall in the degrees before mentioned.

When a Jury is obtained which is unexceptionable, it is then their business, according to the rules of the Com. Law exclusively so, to try facts which are disputed in the case in question.

In Con. the Court with the Consent of the parties, may try facts.

When objections are made to the Jury, it is the province of the Court to try them.

In Eng. the Jurors cannot take any papers with them but sealed ones unless the parties consent. In Con they take all, sealed or unsealed. There appears to be no reason for the Eng. rule.

In Eng. if the Jury are in doubt as to the facts after retiring, they can return to the Court & have the witnesses examined over again. This is forbidden in Con by Stat. Both in Eng & Con they are forbidden to call witnesses privately upon them.

If a case goes by default, the question how much the damages ought to be is tried by the Court in Connecticut. In Eng a Jury of enquiry is appointed.

(1) Dr. Fry if a challange is made to a Jury-man of the fact on which it is founded, the Court appoint two or three men to try the fact on the Spot.

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Mandamus

The writ of mandamus operates in the nature of a Specific remedy.

This writ never issues to enforce a mere private right; as to build an house. There are only two classes of cases when this writ issues. 1 To restore a person to public office when unjustly deprived of it, or when he has a right to it. It is necessary that the office be a public one, else a Mandamus will not be granted. As when a person has been elected Mayor, & the Majority of the Corporation refuse to admit him. And so also when an Attorney has been thrown off the bar unjustly, he may apply to a proper Court for a writ of Mandamus.

2. This writ issues to enforce public officers to do their duty. As to oblige a town clerk to ~~[illegible]~~ record a deed. To oblige a Court of probate to grant administration. In these cases an action on the case will lie for damages. Stra 552. Ca. Th 457.

To ground a Mandamus issues from the Court of Kings Bench. R. Cor from the Superior Court. 7 Bay 431. 1 Kent 19. Pop 176. 2 Nolt 234.

The writ of [illegible] is always to enforce a right; it never issues to turn a man out of office.

Mandamus is not a discretionary writ: tho in one or two instances it is left to the discretion of the Court. As when the officer who refuses to do his duty is a man of property. The Court will sometimes leave him to his remedy at Law in damages. But when a man's honour, or political character or honesty is concerned, the court can exercise no discretion: or in other words when a pecuniary compensation will not be fully adequate to satisfy the offence. As when one has been chosen to an office but has not the evidence. As of the Justices of the Justicy of Columbia, the evidences of whose admission are retained by Madison, the secretary.

If any community can contract who cannot be sued, this writ will issue to compel them to pay; as in the case of the county, who can contract, yet cannot be sued. Stra 93.

All officers & courts of inferior jurisdiction, may be compelled to perform their duty, by force of this writ, excepting that of serving writs. — Judge Rivers knows of no reason why they may not be compelled in Con.

The mode of proceeding with the writ of Mandamus is ——. The person injured must come before the Court & make affidavit of the truth of what he alleges; Thereupon a writ issues for the person to do the act complained of, or to show reason why he does not. If no answer is made to the writ within the limited time, a peremptory mandamus issues commanding him to do the thing, if he refuses then an attachment will issue for contempt, under which he is imprisoned till he complies. — Or if he wishes to make an insufficient excuse the proceeds would be the same. Nell 13 p 107.

If a sufficient return is made to the first process whether the return is true or false, no further proceedings could be had, at Common Law, on the mandamus: But the party injured was left to his remedy by a suit against the other for Damages. This action was on the case, and on it was recovered not only the damages, but a peremptory mandamus. Cas. Ath 171. 1 Lev 430.

By a [illegible] of 1800 the proceedings were the same as at Com. Law, till the sufficient return, [illegible] if false may be traversed on the mandamus. This rule has been adopted in [illegible]

If a person does not perform the act in the time specified by the Court in the peremptory mandamus, but does before the attachment is served, the attachment would not issue. But as it is a breach of an order of the Court some punishment would be inflicted.

If a person is refused admittance into a corporation, the attachment issues only against those who are opposed to him. [illegible] 3 Burr 1799.

Habeas Corpus

There are several kinds of this writ that are made use of in Eng which can never apply in this country; the consideration of them will therefore be omitted.

1st Habeas Corpus Subjiciendum applies to this Counties practice. This is used to bring the body of a prisoner to the proper court, with the cause of detention. Any prisoner has a right to it. In Eng it issues out of all the superior Courts. Whether it is returnable to Chancery Judge N is uncertain. They are regularly returned to the Kings Bench.

In Connecticut it is always made [illegible] to the Superior Court.

Both in Eng & Con it may be granted by either of the Judges in vacation.

All persons confined are entitled to this writ unless they labour under particular disabilities. It is not confined to those who are held in Jail. It is directed to the person who holds the body, and whether the persons is held in Jail or out, by legal process or otherwise, they are equally entitled to this writ.

By Com. Law man confined upon execution for debt, or on conviction of a crime cannot have the advantage of this writ.

The Stat of Ch. in Eng does not allow this writ on an accusation for treason or felony.

Any person is at liberty to apply for this writ in behalf of the prisoner, provided he is entitled to his services, or has an interest in him; and Judge N apprehends that it may be brought by an entire stranger. (1)

The object of this writ is either to have the prisoner discharged or bailed; or remanded on account of the imprisonment being in an improper place.

(1) The object of this writ is either to have a prisoner discharged, or bailed, or removed on account of the imprisonment being in an improper place.

If the imprisonment is unlawful, the Court [illegible] release; if a bailable offence they will allow it; if the place of imprisonment is unlawful they will order a removal.

Improper confinements in the army, & imprisonments of minors are causes for which this writ will be allowed. And so also for taking persons out of the hands of those who are entitled to them by virtue of guardianship. But when a child had been bred by its Aunt, the Court directed that he should act his own pleasure, upon a petition from the [illegible]

When persons have been committed by parliament for contempt, Courts will not allow this writ.

If a person detaining a body does not produce it upon this writ being served, they will be considered as guilty of a contempt, and confined in close hole without bail or mainprize. They are by Stat. subject to penalties in addition to the imprisonment.

The detainer must return the prisoner with the cause of detention. This in the case of an officer is not reasonable in law: but the Judge apprehends it to be otherwise in Con. If the return of the officer was false, he would undoubtedly be subject to the severest penalties.

Habeas Corpus ad Testificandum. This is a writ which issues when a man is taken out of Court to testify. A warrant is issued for the purpose.

This power in law is founded upon a Stat. in Con. upon unwarrantable escape. Before this Stat. it was held in law an escape. 3 Mill 172. 1 [illegible] 157. 2 Bur 766. 606. 1 Stk 348. 50. Stra 1264. Stra 982. 3 [illegible] 1434. 20. [illegible] 586.

Writ of Prohibition

This is a writ which issues from the Supreme Courts in Eng. & from the Superior Court in Con. to an inferior Court and to the parties, ordering them to stay proceedings in a specified suit. It is founded upon suggestion that the Court exceed their limits.

This writ is procured by application of one of the parties. He must produce the proper authorities to evidence his claim, as a copy of his writ &c. If it appears from the face of the proceedings that the inferior Court are exceeding their jurisdiction a peremptory prohibition immediately issues. When a sufficient cause does not appear from the face of the proceedings the party will be allowed to testify, and upon his swearing to sufficient facts, the Court grant a temporary prohibition till the truth of them can be tried.

It is the business of the complainant to serve the proceedings of the Court above, on the party & the Court below. He must also file a declaration of prohibition in the Court above. The fact then

is tried by a jury, & if it is found true, and the court are of opinion it is sufficient to prevent the court below from trying it; they render judgement that the prohibition stands. Quod prohibetur Stet. To the declaration of prohibition the Deft may plead as in other declarations. If the court are of opinion that the court below did not act beyond their jurisdiction they order the prohibition to be

If it appears to the court to be a gen[illegible] of nisi prius whether prohibition ought to be granted, altho the facts appear on the face of the proceedings, yet they will not grant a peremptory prohibition but will order the adverse party to be served with a rule to show cause why prohibition should not be granted, by a specified time.

A writ of prohibition may issue any time before judgment.

After the writ of prohibition is issued, if the court below & the party will proceed on the cause they are punished for a contempt.

It is made a question whether the court are obliged to grant this upon all applications, or whether it is discretionary. Judge B. thinks that if it appears on the face of the proceedings that the court have not sufficient matter laid before them, then it is discretionary. But if the facts specific are sufficient, then it is not discretionary. 2 Str 549. Hob 67. Dyke 586. 1 Sir 65. 1 Sh 33. 2 Rolle 318.

Quo Warranto.

This writ is made use of for the purposes in bill following.

1st When a person claims & exercises an office within a corporation; which right is contested. It then issues to know by what right he holds the office.

2. When corporations exercise powers which they have not.

3. When a body of men claim to be a corporation when they are not, or it is contested.

The Quo Warranto issues in these cases to try the facts. The proceedings in Quo Warranto are in the nature of public proceedings.

The person complaining lays before the court the state of facts, & prays the writ of Quo Warranto may issue. This writ then makes a rule to show cause why the information should not be granted. If no cause is shown, or if the cause is an insufficient one, an information issues.

The Deft when before the court must plead, justify, or disclaim any further right which is contested. In which cases if his justification or disclaimer is not sufficient, the judgement is ouster. The proceedings against a corporation are the same except the judgement for that declares that they forfeit their powers. If against persons claiming to be corporations, the judgement is that they are not corporations.

A fi facias issues to take the rights of the corporations, on which he returns he has taken them. By this judgment the powers of the corporation are taken away.

A General View of Pleas and pleadings

Plea to the Jurisdiction

This is the first plea a man can have; it is sometimes called a plea in abatement. It must depend upon the power vested in the Court.

The Deft pleads that he ought not to be holden to answer, because the court have not jurisdiction, being either above or below; in either case this must be stated.

The Jurisdiction of the Courts in this State are defined in the statutes.

This plea is never signed by the Attorney, but by the Deft. For the Attorney being an officer, of the Court, his signing would be to admit the Jurisdiction.

If the court has not Jurisdiction, they must dismiss the cause. In this case by Common Law (Was practised every where but in Con) the Court cannot give cost. The party must have recourse to an Action of Trespass vi et armis. In Con they allow the Cost in favour of the Deft.

Plea of Abatement

This is the next plea in order that can be made. It is showing some reason why the writ in its present state should not be maintained.

There a distinction should be observed between writs, & declarations. In Eng the declaration is not filed till the writ is returned into Court. In Con the writ & declaration go together. The writ part is all that will you summon a man to answer to the particular case; as in an action on the case &c. The Date & signing are common to both; for in Eng, as well as in Con there must be a signing & Date.

If there is any exception to the declaration that must be taken notice of by another mode, hereafter to be pointed out.

The causes of a Plea of Abatement may appear on the writ, as they may be extraneous. If there is, for instance, a misnomer, there cause on the face of the writ.

So also when no duty is paid when the law requires. Or it may not have been signed by sufficient authority.

The causes, are extraneous when it was not served by a proper officer; or not a proper time before the Court. In these cases you must plead that it was not served by a proper officer; or that it was not served a proper time before the Court. It may also not have been served at all; or not properly as would be the case if it was put under the Door. The writ also may be well in itself but another ought to be joined; as would be the case if a married woman was sued as a feme sole. And also whenever a man who ought to have been joined is sued alone.

If the writ is not abated the Judgement is that the Deft answer over. If abated the Deft need not answer till another writ is legally brought.

There are many other causes of abatement.

A writ may sometimes, when defective be amended. Let the plea be what it will yet if it can be amended consistent with truth, it may. But if it cannot be amended with truth, no amendment can take place. An instance of the first kind is a misnomer. An instance of the second is, it not having been served a proper time before the court. If the endorsement of the service was the mistake, if it can be amended consistent with truth, it may be amended.

It is laid down as a general rule that whatever may be plead in abatement, must be plead in abatement, or the court will presume it was waived, & no advantage can be taken of it in any other stage of the proceedings, as by an arrest of Judgement &c.

Yet there are some cases when it may be erroneous to render Judgement. When for instance, it would be faulty for the Court to render Judgement. As in case of suing a feme covert.

One class is called abatable; the other abated.

It is a rule in Con that if a man is out of the state, Judgement cannot be rendered the first court. Then it would be improper to render Judgement over out a plea.

It is also laid down as a general rule, that when a person abates a writ, he must give the Pltff a better one. This must be understood with some qualification. When it lies as well in the knowledge of the Pltff as Deft, he is

not obliged to amend. If however the fact is more probable within the knowledge of the Deft than the Pltff then he must furnish him with a better writ; as would be the case if the Deft was misnamed.

When the Jurisdiction cannot be objected to, nor the writ abated, then they proceed themselves for the next proceedings. Demurrer General issue – & Pled Plea in Bar.

Demurrer is when the facts are admitted but denied to be sufficient in Law. General Issue denies the charge. Pleas in bar, admit the offence, or that the right once existed &c were it not for some fact which now exists. & as if it ~~had to~~ had been settled by a ~~&~~ satisfaction. Or it was obtained thro' Duress. Or there was an unlawful consideration &c

Demurrer.

There are two kinds of Demurrer – General and Special.

A General Demurrer states that the thing is insufficient in law.

A Special Demurrer enters into particulars & states wherein.

In all cases where the subject matter lays no foundation for an action, the general Demurrer is good. But this is not the only case. If an essential allegation is left out, as want of consideration; the general Demurrer will reach it & is the proper plea; so also when notice was necessary & was not alledged.

It is laid down in the books that nothing is admitted by Demurrer but what is properly plead. This is somewhat obscure. By way of illustration. A man does not admit any thing which cannot be proved. ~~Sup~~ & promise to obtain another promissory note if he will go to Hartford; this is plead & demurred to, but not admitted to be true, for a verbal agreement cannot ~~supply~~ destroy a writing.

If there was no manner of cause for an action it will be an everlasting bar to a future action. If there was a cause, but only an omission of a material allegation, another may be brought.

A Special Demurrer is proper, when all the allegations are made, but in a manner which is not conformable to

Law; being informal made. It is saying that "notice was given", when the law requires "notice to be in writing". A general Demurrer would not reach this.

There is a thing which is called praying oyer & Demurrer. For. If a man states that, on the by writing recommended a man to his credit, for a certain quantity of goods. The Deft does not put this construction upon the writing & does not wish to demur to it as it stands asserted. He then prays oyer of the writing declared upon. Then he proceeds to state what it was so & so — saying that the Deft having had oyer of the writing finds it to be so & so, & then says that it is insufficient in law. — So wherever a man declares upon the construction of a writing & the Deft does not agree, he may pray oyer & Demur: If it is recited verbatim, it is not necessary. The Judgment in Demurrer is in chief, if nothing more is done. But the mode of ascertaining this is by enquiring into the Damages. This enquiry in by & most of the states is made by the Jury, in Eng the Court assess the Damages.

Plea in Bar.

This admits the cause of action, but states some facts which exist. As if the Demand had been settled by record & satisfaction. it originated in Dunes. Or there was an unlawful consideration.

The facts may be coexistent with the contract, or they may be subsequent to it.

Many of the causes of a plea in bar, may be given in evidence under the general issue.

Originally nothing could be given in evidence under the general issue, but that he was not guilty of the fact.

The plea in bar must always conclude with a verification. As that the Plff ought to be barred because altho true it is he gave the bond, yet since the Plff has given him a release from every thing contained therein, & this he is ready to verify." There are in this stage of the proceedings three things for the Deft. 1st If it was in his opinion no defence, then he ought to Demur. 2d If a defence, & not true, then he must traverse it. 3d If good & true, & the Deft would avoid it by some new matter, then plead that. ~~When he alledges new matter, then plead that~~. When he alledges new matter he must conclude with a verification as the Deft did.

Whatever a person does not deny he admits.

When a person traverses then an issue is immediately formed to the Jury.

When the Pltff alledges new matter in avoidance, & the Deft traverses it to be true, then if he has further matter to allege in avoidance he will rejoin them. If the Pltffs facts are not sufficient, he will Demur. If they are not true he will traverse.

It sometimes happens that a man in the first setting out will traverse some part of the declaration, as a denial of notice, where it is necessary, then the issue is formed; every thing else is presumed to be admitted.

General Issue

Originally when a man plead non assumpsit nothing but that could be given in evidence under it. But now any thing which could be given in evidence as a bar, may under this plea. Any thing upon a contract may be given in evidence under it. Non Assumpsit now means only that he is not liable. It was originally held that under this plea in Indebitatus Assumpsit any thing could be given; but what is could under such a plea in express Assumpsit is now modern.

Our law is the same only when the Deft is exempt from his liability by some lawful act of the Pltff. As a release, an acquittal, or when united with an act of the Deft as accord & satisfaction.

The key practice in when there are torts or wrongs, is a denial of the facts, & a Justification it may be given in evidence under the general Issue, except in cases of trespass vi et armis.

When contracts are of a higher nature than bare assumpsits, as bonds, & sealed instruments, you cannot under the general issue give in evidence any thing that will discharge it, but must plead it, as Duress, infancy &c. But if a person could not give a bond as a feme covert, she need not plead it, but non est factum.

When the contract can be avoided against at law as by reason of fraud, then non est factum is the proper plea, provided the contract was so vitiated by fraud as not to be his act & deed.

In Cos all these facts may be given in evidence under the general issue.

Demurrer to evidence

If a man brings a case against another which is good upon the face of it, but upon entering into the proof the facts ~~proved~~ appear to be such as will not support an action in law, a man may, & usually does Demur to the evidence.
By Demurring the Deft proceeds & states that such & such things have been proved, & he now says that they are insufficient in law.

If the evidence produced is in writing the Court will compel a Joinder; but if not in writing but parol, it is said the Court will not compel a Joinder if the opposite party opposes; but to this rule there is no authority; some of the elementary writers say that the Court may exercise a Discretionary power.
The reason why he is not always compellable in verbal evidence is, that there may be a mistake in the statement made by the Deft. Instly. There has been a Decision that the Court may compel a Joinder in Demurrer to the Pltff. in verbal evidence.

This rule of Demurring to evidence applies as well to the Defts testimony as the Pltffs.

Every matter to be pleaded ought to be so pleaded as that the Court may judge without minding any opinion of the party who pleads it. If a man pleads that he brought his cause before a court of competent Jurisdiction, the Court cannot know whether it was brought before a court of competent Jurisdiction, there being nothing but the opinion of the Pltff. He should also state before what Court, & when & at what time. — If a man should go on & state that he took out execution on in the form of law this is only an opinion. He ought to state that it was ~~only an opinion~~ signed by the Judge. So in a case of Usury — that there was a agreement to take more than six pcent. The particular degree of minuteness can only be ascertained by any matter.

If an action of covenant was brought if the covenant was negative — the Deft need only state that he did not do the thing. As if a man should covenant that he would go down to Jamaica without deviating, If an action is brought for Deviating, he need only state that he did not deviate. If the covenant was positive, then that he did do the thing.

If the covenant is to do, a man should, unless there be too many acts, & would render the plea ~~if~~ very prolix ~~he should~~ state what he did.

If there be any legal question about the manner of doing, he must state the manner. As also if a man should covenant that he would clean a debt, he should plead the manner of doing it, & not merely that he did clean, for a mere verbal clean might not do.

If there was a bond with a covenant to save harmless, he must go on & state how. As if a man upon the Dissolution of a partnership should covenant to save his partner harmless against Debts, and is sued upon it, then he must state in his defence in that manner.

If an award has been made & the bond to abide it is sued upon, The Deft will plead that there was no award It is not sufficient for the Pltff to state that there was an award, but he must go on & state in what manner it was made, for the Deft might mean that there was no legal award. If the Deft means that there ~~will~~ was no legal award then he will Demur. If [illegible], then he will traverse.

It is laid down also that the plea must be as broad as the charge; & therein the Pltff will recover, and the least [illegible] of ~~correction~~ Deficiency will be sufficient to entitle him to Judgement. And so it will be if the Pltff replication does not fully cover the Defts Plea. If for example, the Pltff should complain of an assault & battery & imprisonment. And the Deft should plead that he was an officer, & that the Pltff under a writ, shewing what it was, & imprisoned him. Then the plea does not cover the declaration, for he was not justified Twenty for the battery. He ought to complete his Justification go on & plead that the Pltff made resistance.

If the declaration charged a trespass in breaking three pains of Glass, & plea that he did not break three panes does not cover the declaration, for he might have broken one. He should have plead that he did not break the panes no one pane.

If the Declaration charged a trespass in cutting trees of the 15th March. And the Deft pleads that on the 15th March he had a licence to cut trees. This is not a good plea. For in trespass he may lay any day within the years. He should therefore traverse cutting any trees before or after. If instead of a licence, he should plead release for the 15th March, it is not good. The release should be for all trespasses before & after ~~within~~ within the stat of limitations.

Another rule is, that it is not a good plea to pr[illegible] what amounts to the general issue, instead of it. When such a plea is given in the Inferior Courts, they will not allow it to be demurred to, but will order the general issue to be plead, if he has nothing else. The Con is here the practice to demur to it but he thinks the Courts would not [illegible] recognize it.

When the Statutes are general you need not as a general rule plead it specially, nor show it under the general issue. But if there be a special law regulating a particular set of men, or a corporation, you must spread it upon the record, & plead it specially. — And if a general law voidates a specialty, it must be plead.

When a man covenants not to sue an obligation, this covenant may be plead in bar, for it amounts to a release. But if the covenant was not to sue it for a limited time, then it cannot be plead, but taken advantage of ~~only~~ but as a breach of covenant. When a covenant not to sue it at all is made, it should be plead according to its legal operation. Vi, as a release.

Pleading in otherwise would be substantially bad, tho it would for form; consequently could be taken advantage of only as a Special Demurrer.

When a man enters into a bond, conditioned to do certain things, & is sued upon the penal part, the D't will ~~reply~~ plea that he has kept all the conditions of it; the Pl'ff will begin his reply by stating that he has not, & will then proceed by the particular breach.

Repleader.

In some cases the Court will order a repleader. If, for instance, the parties should come to issue upon an immaterial point, which does not settle the merits of the cause, they will order them to replead.

This is true as a general rule, but if it was the error of the party petitioning, they will not grant a repleader.

Arrest of Judgement.

This is a motion to have the Judgement arrested after the verdict.

It must be for something apparent on the face of the record.

When the facts stated are not sufficient in Law, even after verdict, the Court will arrest. As if a man should charge another with lying, & he should plead not guilty; then it may be arrested for it is not sufficient in Law. So if there is an insufficiency in the plea in bar, replication, or rejoinder &c.

There are many defects which are cured by verdict. Where there is no cause of action it is not cured.

Does a verdict cure the want of a material allegation? Judge Kent thinks that as a general rule every declaration, that would be bad upon a general Demurrer, is bad upon verdict. But that all defects that are reached only by Special Demurrer are cured.

~~Verdicts~~

It has been mentioned that a person should so plead if possible, as not to suffer the law to go to the Jury. — If the Deft sues upon a promise, & the Deft pleads his infancy, the Pltff replies that they were necessaries generally; — is this good pleading, it being a question of law whether they are necessaries or not? ought he not to go on & state what they were? It has been always held good pleading to say that they were necessaries generally.

Verdicts

These are of two kinds. General, & Special.

It is always a general verdict, when the verdict is found in the words of the issue, and this whether the pleadings were general or special.

A special verdict is when the Jury find all the facts, but submit the question of law arising thereupon to the Court.

The Jury have always a right to bring in a special verdict; but can never be compelled to.

The Jury must be unanimous in finding the verdict. If they come in & make no objection to their want of unanimity, it cannot be overhauled afterwards.

It is said to be law in Eng that the Jury may be carted from court to court if they do not agree.

It is not an uncommon thing in Eng for the Court to recommend the Jury to a second consideration, but they cannot compel them.

In Con in civil cases the Court by stat may send them out to a second hearing. But not in criminal cases.

In Eng in some instances in criminal cases the Court may send them out.

The Jury have no right to take evidence of a written nature, which is not delivered them by the court. But if they should take a note, bond, deed, &c, or any other written testimony which has once been given in testimony, it will not vitiate the verdict. But it would be a breach of the rules of the Court, & would be punishable.

The verdict would be bad if the Jury gave any information from their own knowledge, which had not been offered in Court. 2 Rolle 714. Co Lit 227. Cro El 411. Dy Hay 148. 1 Lev 133. 235.

Nor have the Jury a right to call in ~~a Jury~~ witnesses after they had retired, whether they had been examined in Court or not; if they do it vitiates the verdict. —
The reason of this rule is, to prevent their asking any improper questions: But if they ask only proper questions the rule is still the same

By common law rules, the Jury have no right to eat or drink till they have produced their verdict. It was formerly considered ~~to~~ as sufficient matter to vitiate the verdict, even if they eat at their own expence. But now it is only punishable as a misdemeanor. If they eat at the expence of one of the parties, it vitiates the verdict; and is moreover a misdemeanor. — If they eat & drink at the expence of both parties, it neither vitiates the verdict, nor subjects the Jury to a fine. 1 Vent 125. Co Lit 227.

In Connecticut Jurors may eat & drink at pleasure. Nor are they obliged to keep together till a verdict is formed.

The Jury have no right to converse with any person about the cause. If asked questions & they say any thing further than that they are agreed or not agreed, it vitiates the verdict. They cannot help hearing any persons who talk to them; but if one of the parties says any thing to them about it, & he afterwards obtains a verdict, he loses the benefit of it. 4 Vent 125.

The manner in which verdicts are set aside will be considered under the head of new trials.

It is a general rule, that no verdict shall be given in evidence, but between such persons as were parties to the suit in which the verdict was given or privies to them Lib 736. Therefore a verdict in an indictment cannot be read in an ~~indictment~~ action for the same cause. Ib

The reason of the rule is, that it is the privilege of the party to cross examine the witnesses; of which by this means he would be deprived. Ib

Courts will not listen to affidavits of Jurors

stating the circumstances & inferences under which they gave it verdict. 5 Mar 2607

Nice & subtil devices & inventions of pleading ought not to alter any principle of Law, which you have heard plentifully before. Co. Lit 303 b

(1) The order of good pleading is to be observed, which being inverted great prejudice may grow to the party, ~~tendering~~ tending to the subversion of Law.

First, in good order of pleading a man must plead to the jurisdiction of the Court. Secondly, to the person; & there in first to the person of the Plaintiff, & then to the person of the defendant. Thirdly to the Court. Fourthly to the writ. Fifthly to the action, &c which order and form of pleading you shall read in the ancient authors agreeably to the law at this day; & if the defendant mis order any of them, he loseth the benefit of the former. Co Lit 303.a

A Count or declaration, which anciently and still is called Narratio, ought to contain two things, viz. certainty & variety. But it must be understood that there are three kinds of certainties; first a common intent, & that is sufficient in a barre which is to defend the party & to convince him. Secondly a certain intent in general, as in Counts, replications, & other pleadings of the Plaintiff that is to convince the defendant, & so in indictment, &c Thirdly a certain intent in every particular as in ~~retoppels~~. Ib

When any special & substantial matter is alledged by either party, that ought to be especially answered, & not passed over by a general pleading. Ib 303.b

All mesne circumstances implied by Law in a plea need not be expressed, as in the plea of a feoffment of a manor, livery & ~~fo~~ attornement are implied. Ib

When a Count, bar &c is defective in respect of omission of some circumstance, or time plaintiff then it may be made good by the plea of the adverse party; but if it be insufficient in matter it cannot be salved. Ib

That which is apparent to the Court by mesne collection out of the record need not to be averred. Ib

If any of the Covenants of an indenture are to be done of record, he must show that specially, it cannot involve that in a general pleading.

See Ante 800

Pleas & Pleadings.

3 Blk 293. Pleadings are the mutual altercations between the Plff & Deft;
10 Co 132. which at present are set down, & delivered into the proper Office in writing; tho' formerly they usually were put in by Counsel "ore tenus" in Court, and there minuted down by the Clerk.

4 Bac 1. In strictness pleadings are no more than the setting forth of such facts as show the Justice of the Plff demands, or of the Deft defence.

The principles of pleadings are founded in sound sense & Logic, and every good declaration, or plea, contains the substance, or elements of a complete syllogism, consisting of a Major, a Minor proposition, & a conclusion.

3 Blk 273. The first stage of a suit commenced is a writ, which is called a mandatory letter, directed to the Shff, requiring him to command the party accused to appear in Court, and answer the accusation against him.

3 Blc 293. The first stage of the Pleadings is the Count, or declaration,
Co Lit 17a. in which the Plff sets forth his cause of complaint at length;
5 Com 10. being indeed only an amplification, or exposition of the original writ upon which his action is founded.

3 Blk 317. In by pleadings were in Norman French from the conquest to the 36th year of Edward 3. when latin was substituted & continued in use till the 4th Geo 2. since which time they have been in English.

4 Bac 6. Pleadings in the limited sense are composed of those allegations which succeed the declaration, & consist of the allegations which the Deft makes by way of defence, & of those which the Plff makes to justify his Count.

3 Blk 309. The first stage of the Pleadings on the part of the Deft is
4 Bac 6. an answer to the Plffs allegations, which must either deny the facts stated, or confess & avoid them.

3 Blk 301. All the pleas which the Deft can make may be divided into two kinds, viz. 1 Dilatory pleas, & 2 Pleas to the action.
Dilatory pleas are those which tend merely to delay the suit, rather than to deny the injury.

4 Bac 35. 1st Dilatory pleas may be subdivided into three kinds, which are. 1st pleas to the Jurisdiction of the Court; 2d Pleas to the disability of the Plff; & 3d Pleas in abatement.

3 Blk 301. Dilatory pleas cannot be pleaded after a general imparlance, which is an acknowledgement of the propriety of the action.

3 Blk 301. 3. 2nd Pleas to the Action, are answers to the merit of the complaint either in point of fact, or of law; and may be made either by demurrer, confession, & avoidance. — These are likewise divided into three kinds. Viz.

1 Demurrer; which is an admission of the facts, but a denial of their sufficiency in law. Demurrer is sometimes called an excuse for not pleading; rather than a proper plea.

2 General issue; which traverses & denies at once the whole declaration, without offering any special matter whereby to evade it.

3 A Special plea in bar, which always alledges new matter, in avoidance of the Plff action. (1) for general Nil

Of the Declaration.

Co Lit 17a. Plow 84. Hob 190.

With regard to the Declaration the most general rule is that it must always show all that is necessary to the Pltff right of action.

Cro El 325. 1 Mod 93. Co Lit 87a. 2 Bac 13. 144 - 144.

In order to maintain a suit, the Pltff's right of action must have been complete at the time of commencing the suit; If the declaration shows that at that time the Pltff had no right of action, he can not have judgement.

5 Mod 305. 4 Bac 8.

The first of the action is that without which Judgement cannot be given for the Pltff.

4 Bac 8.

A declaration may be either general or special; as in an action of Covenants, the Pltff may state his title generally, that is without shewing how he acquired it; then the declaration is general: or he may specially explain or state its derivation; in which case it is called special.

When the declaration is general if it is well drawn it cannot be demurred to; but the Deft must plead the general issue, or a special plea in bar.

Co Lit 303. Plow 84. 122. 5 Co 35. 1 Com 27.

Every declaration must contain certainty as to the practice to the suit, time, place, & subject matter; that is it must be explicit in the description of these particulars; for it is necessary that the Deft should know what he is to answer, that a regular issue may be formed on it, and that the court may know how to give judgement.

As to the form of the Court & all the particulars concerning it, see Com Dig Pleader C.

Of Pleading.

Dyer 270. Co Lit 164. 1 Com 10.

In some cases several persons may join as Pltffs, and in others they cannot. The rule of discrimination is; that when two or more persons are jointly interested in a right they may joined in an action brought for its violation.

1 Com 13. Co El 143. 1 Leo 315.

But when the right violated is several, that is vested in one only, two cannot join.

There are also under this head certain rules which respect the joining of causes of actions.

Com 244. 1 Bac 30.

Different causes of action of the same nature may be joined thus, Debt, and Detinue may be joined.

To explain this rule; It is generally true, that when there are two, or more causes of action, they may be joined, if the same judgement would be proper for both.

1 Will 252.

But this rule is by no means universal. It is universally true however, that if the same plea, that is the same general issue, & the same judgement would be proper for both, they may be joined. ~~1 Tr Rp 276~~.

1 Tr Rp 276.

At Common Law there were two kinds of Judgements, viz, "Capias" & "Misericordia".

1 Tr Rp 276

The rule is universally true, that when the causes of action are founded on contract, several may be joined, if the pleadings, that is the general issue & judgement be the same in both.

When several causes of action are founded on contract they may generally be joined in the declaration if the judgement is the same, tho the plea be not the same.

Thus debt on judgement, debt on bond, & debt on a mutuatus may all be joined in one declaration, tho' the pleadings, that is

(1) Query — Are not all movements transitable by
those which relate to the substance of the notion.

1 Bac 30. 1 Will 252. 1 Kebl 147. 1 Vent 366. 6 Ch 315.

The general issues are all different. In the first the general issue is "Nul tiel Record"; in the second "non est factum" & in the third "nul debet". 1 Bac 30. 1 Will 252. 1 Kebl 147.

1 Mod 4. 1 Bac 30.

But debt & account cannot be joined; for the pleadings & Judgement are different.

2 Co 84. 1 Ta R 276. 1 Vent 223. 2 Bla 840. 1 Will 252.

Several trespasses of the same nature may be joined; that is if the general issue, & Judgement be the same. As for Example; several trespasses "vi et armis"

Salk 10.

Trespass vi et armis, and contracts can never be joined. For they are of a different nature.

1 Vent 366. Jenk 211. 7 Mod 233. 2 Will 319.

Neither can trespass on the case arising ex delicto, & Contract be joined, altho' the Judgement is the same; for the Plea is different; nor can trespass vi et armis, & trespass on the case arising ex delicto; for tho' the general issue is, yet the Judgement is not the same. 1 Vent 366.

Salk 10. 1 Lev 99. Carth 436.

A Misjoinder is a fatal mistake, as it is not cured by verdict.

Of Averments.

7 Co 10a. 1 Saund 319. 20. 1 Ta R 645. 2 H Bl 574.

When the Plff's right of action is to accrue from the performance of a condition precedent, he must aver performance, & an omission of it is fatal; for it is necessary, that all which is essential to his right of action be shown.

2 Mod 309. Hob 88. 1 Pow 75. 6 Ta 645. Cam 265.

But when a condition annexed to ones right of action is subsequent, it needs no averment of performance; for the right vests in the Plff before performance. The same rule obtains with respect to reciprocal contracts.

Co Lit 303. 5 Co 45. 3 Lev 206. 8 Ta 351. 2.

It is said that all the Averments, which relate to the substance of the cause of action must be direct & positive; for otherwise the fact could not be traversed, by pleading.

Stat 10. 11.

This rule however is not universal, as it contemplates those averments only, which are traversable, by plea (1) ~~Pleadings 10.~~

1 Mod 251. Yelv 71. Pop 177.

Mere matter of inducement is that which does not go to the gist of the action, and of this, the averment need not be direct, & positive but may be by way of recital, as under a whereas &c.

Those parts of Pleadings which succeed to the declaration are commenced by the Deft. We next proceed to consider those of dilatory pleas.

Of Dilatory Pleas.

1 Com 2. made 4 Bac 35. 51. 2 Will 51. 1 Mk 302.

Dilatory pleas are so called because they were originally made use of for the ~~sole~~ purpose of delaying the suit. And the practice continued till the 4th of Anne, in whose reign it was enacted that no dilatory pleas should be admitted, unless the Deft made affidavit to induce the Court to believe there was or produced matter to them satisfaction. In Con these pleas stand upon the same ground, with regard to their admissibility as at Common Law; and the abuse which called for the Stat of Anne, has never crept into our practice.

To the Jurisdiction.

Pleas to the Jurisdiction of the Court are of three kinds.

1 — That the court have not jurisdiction of the subject matter.

2 — That the Deft has some privilege by reason of which he is not suable before such court.

Com 3. Ath. 11. 154. 2 544. Bac 36. 8 Mod 305. 3 That the cause of action did not arise within the local limits of the court. This last plea however is good when the Court is of a limited jurisdiction; & not otherwise. —

Mod 145. Com. Ne 90. In Eng all pleas to the Jurisdiction must be signed by the party; for the Attorney is an officer of the Court, & of course the signing of the plea by him, would amount to an admission of the Jurisdiction.

But in Con it is as customary for the Attorney to sign this plea as any other.

A plea to the Jurisdiction is regularly the first in order of Com. 5. Lit 12. the Deft's pleadings; for when a plea to the Jurisdiction is necessary, if he puts in any other plea, he waives all exceptions to the jurisdiction.

The Deft is not bound to plead to the Jurisdiction, when the Com 333. subject matter is not within the Jurisdiction of the Court. Nor does Bac 35. he by putting in any other plea waive his objections to the jurisdiction, he may take advantage of it at any subsequent stage of the proceedings. Indeed he is not bound to plead at all in answer to the Pltff, for when the subject matter is not within the Jurisdiction of the Court, the whole proceedings are "Coram non Judice".

As the practice is in this State it is expedient to plead to the Jurisdiction, tho' the want of it go to the subject matter; for then the Deft will be allowed his costs by the Court, whereas if the action be afterwards discharged on motion, ex officio or any other way, besides that upon a plea to the Jurisdiction, he will be left to his remedy in an action.

But when the exception is founded on the privilege of the Deft, or the local limits of the Courts jurisdiction, the Deft must plead to it.

Blk 303. A plea to the Jurisdiction always concludes to the cognizance Mod 145. of the Court in this manner; "Wherefore Deft prays Judgment, whether Salk 263. the Court will have further cognizance of the said suit".

To the disability of the Pltff

The grounds by which pleas to the disability of the Pltff are supposed are various.

Com 6. 1. By outlawry the Pltff, until it is reversed, or pardoned, he Co Lit 128. Bac 20. is disabled from proceeding in any action, for an outlaw is not legalis homo & has therefore no civil rights.

This disability extends to such suits only as are brought Co Lit 128. 3 Bac 762. in the outlaws own right, & not to those brought in Autre Droit; as when he is Executor &c.

But if the Testator was an outlaw, his Executor is disabled Cutwick 304. Com 6. from maintaining any suit as Executor, being his representative.

Com 1. Altho' an outlaw has not the privilege of maintaining a 1 Lid 61. suit, yet he may be sued.

But when an outlawry is pleaded it does not strictly not 3 Bac 35. abate the suit, but merely suspends it; for after the reversal of the outlawry, or a pardon the Deft must plead to the same suit.

Outlawry in the Pltff, is always pleadable in abatement, & Dyer 227. Co Lit 128. sometimes in bar. The rule is this, when the ground of, or cause of 3 Bac 761. action is forfeited, the outlawry may be pleaded in bar; but if it be not forfeited it must be pleaded in abatement.

610 18

(1) Are to be preferred. E.g. When a note was made in England, payable in Ireland, it was held that it should carry Irish interest.

Thus when the damages are merely presumptive, as in an action for Assault & battery, it must be pleaded in abatement; for in such cases the cause of action is not perpetuable.

2d Another disability of the Plff is excommunication; which disables him to maintain a suit in his own right, or as Executor or Administrator.

2 Bac 310. Co Lit 133. 8 Co - 63. The reason why he is disabled from being an Executor, is, because he cannot dispose of the goods to pious uses.

This plea of excommunication does not put a final stop to the proceedings; for when the Plff obtains absolution, he may proceed. So the plea of excommunication, absolution is the only good replication which the Plff can make. 3 Bac 320. Co Lit 133.

3 Bac 320. Co Lit 133. a. 2 Ball St 72.

2 ~~Bl~~ Blk 151. 2. 1 ~~Bl~~ 146. 3 Blk 384.

3 Alienage is also in some cases a disability for an alien born, tho a friend, unless he be naturalized, or made a Denizen cannot maintain any action real or mixed. Yet if he be an alien friend, he may maintain a personal action, altho the contract was made in another country.

There has been a decision in Con by which it was

Kirby 25. ~~Held~~ that if two foreigners make a personal contract, in a foreign country, an action brought by one against the other, to enforce that contract it shall not be supported.

2 Hen Blk 161: 1 Bl 146. 3 Bac 384.

But this rule cannot be law, for it is directly repugnant to the law of nations; ~~How~~ for personal actions follow the person, which rule is corroborated by the general rules of the municiple law.

It is proper to observe, that ~~no~~ contracts ~~can be~~ are enforced, ~~but~~ in pursuance of the laws of the Country in which they ~~actions are brought~~ (1) ~~but~~ if a Contract be made in Prussia with a view to have it performed there, which would be valid there, but which would be void in Eng, it shall be enforced notwithstanding; and according to the laws of the Country in which it ~~was~~ was made. And this rule of Law is recognized in every civilized State.

1 Bac 4. 1 Com 7. a Co Lit 129. a Sty 108 2.

But an alien enemy can bring no action at all whether real, personal, or mixed.

This rule however contemplates those actions only

1 Bac 84. Coll 142. 688.

which are brought in the aliens own right; for it is a disputed point, whether he may not maintain an action in Autre Droit. And it seems to be the better opinion that he may maintain such an action.

Co Lit Ford. 1 Bac 84.

It is settled that an Executor he may hold leases, tho formerly this was doubted.

But if an alien enemy have a license from the

2 Ro 201. Ill 46. Jones 221. Sty 1082 Ripp.

Sovereign of the State, or if he came into the Country under a safe conduct, he may maintain personal actions in his own right.

In all cases when he cannot maintain an action, his alienage is pleadable as a disability.

4 Bac 136. 1110.

4 & A conviction of popish recusancy: Judgment of Praemunire, & attainder of Treason are also disabilities of the Plff.

Co Lit 132.
Sty. 631.
1 Com. 9.
Bull 443.

5 Coverture of the Plff is also pleadable as a disability which is only pleadable in abatement", as the books express it, by which is meant, that it is pleadable only as a dilatory plea, for it is not strictly a plea in abatement.

It is a general rule that whatever might have been pleaded in abatement shall not be taken advantage of in any subsequent stage of the proceedings.

4 Bac 39.
3 Bull 316.

If a Feme sole marry after commencing a suit, the Coverture may be pleaded, even after a general imparlance.

3 Bulk 301
Co Lit 135
Palm 296
Carth 140
3 Bac 140 &c.
3 Bulk 303.

6. Infancy in the Plff, unless he sue by guardian, or Prochien Ami, is pleadable to his disability.

Pleas to the disability of the Plff conclude to the person praying judgement; "if he the said Plff ought to be answered".

In Abatement.

Co Lit 134.
4 Bac 35.
Bull 15. Carth 272.
3 Bulk 301.

Pleas in abatement go to prostrate the writ for some defect therein. They generally reach the writ & not the count.

1 Com 37-36.
43-44.
6 Mod 132.
145. 3 Bulk 301.

If therefore the declaration be wholly insufficient a plea in abatement will not affect it. Yet it is not universally true that every plea in abatement goes to the writ only; for in some cases tho' rarely, they extend to the count.

In Cov the writ & declaration are not distinct, both being contained in the same instrument. The direction to the Shff with regard to the residence of the Deft, the place of court &c & words for prosecution, & the signature are considered as constituting the writ; the part of the instrument which sets forth the injury, damages &c the declaration. The date is considered in common with the writ & declaration.

3 Ld 105.
5 Mod 53

It has always been the policy of the Courts to discourage pleas in abatement. And therefore it is necessary, that they be very accurate, for the slightest defect is fatal.

1 Bac 5.
2 Mod 272
2 Mod 197
Lut 46.

1st Any privilege of the Deft rendering the ~~writ~~ suit in its existing shape improper, may be pleaded in abatement.

1 Com 2. 3.

Such a privilege however according to the books, tho' a good ground for a dilatory plea, as a plea to the jurisdiction of the court, is not strictly a good foundation for a plea in abatement.

Lylk 1.
Lut 1657.

In by attornies as long as they are such of record, are privileged from being sued in any other Court than that of which they are officers. But in their pleas they must count upon the record.

Hob 177.
Lk 2.
Ld Ray 853.

This privilege extends to those suits only which are brought against them personally, & not to those where they are made Defts in Auter Droit.

Dyer 277.
1 Lut 293.
1 Lev 109.
2 Ld 156
Co Cas 508

Nor does this privilege extend to those cases where they are sued jointly with Common people; nor to actions which are cognizable only in a Court of which they are not officers.

Lk 7. Mod
7 Mod 20.
1 Ld 247.

2 Another cause of abatement is misnomer of the Deft; that is giving him a wrong name.

6 Mod 85
3 Bac 617.
610. Co 6
371. Carth
190. Dyer
1014.
Comb 60.

Also giving him an addition, or an omission of it, as calling the Deft Esq when he is a Shoe maker, or not particularizing him by his title, Office, profession or place of abode, is pleadable in abatement under the Stat 3d Hen. 5.

4 Bac 47.
3 Ro 620.
2 Mod 4.
Carthew
301. 2.

In this State the only addition which is necessary, is the Deft place of abode, except when the Deft's Official, or civil character is the indictment to the action, in which case the addition of his office &c is necessary as at Common Law. Thus for example; in Actions brought against Sheriffs, Executors &c as such. This addition is necessary.

Cro El 333.
3 Bac 621

Any addition which is superfluous, is nugatory merely, and will not vitiate the writ.

Lutw. 36.
3 Bac 617.

The misnomer of one of several Defts, tho pleadable in abatement by himself, is not so by any of his Co-defendants.

~~2 Hale P C 177.~~
2 Hale P Co
177.

This rule also holds with respect to criminal prosecutions.

8 Co 139.
3 Bac 625.
1 Com 79.
Carth 98.

If two persons be sued, & one of the two be misnamed, he who is misnamed may abate the writ; yet the abatement will not extend to the other. This rule holds where the cause of action is several; but where it is joint, if it is abated by one, it must in Jed B— opinion abate as to all.

2 Roll 469.
1 Com 15.
3 Bac 617.
Comb 189

At Common Law before the Stat of Hen 5. it was not necessary to give the Deft any addition, except in the cases of his being sued in some official, or civil capacity, as supra, unless he was a Knight. And if the Deft was a Knight or of any superior dignity or degree, he also must have given himself his title.

Hind L
363.
3 Bac 624.
8 Co 515

If the defendant plead a misnomer, or want of addition, he must give the Pltff as the exception is a better writ, that is he must correct the Pltff by setting forth his name, or addition; for if he does not his plea is demurrable. . . .

In Com the Dg need only set forth his place of abode, as that is here the only necessary addition.

Skin 629.
Salk 647.
4 Mod 347.
2 May 118.
110. 249.

A Deft who is wrongly named must also aver, "that at the time of the writs date" he was called & known by the name of J. S — which is his right name."

A misnomer or want of addition is regularly pleadable in abatement only; but the rule is not without exceptions. And hence the mistake is waived by any plea to the action. 1 Roll 780. Carth 124: Salk 2.3: Comb 188: 6 Co 766.

If one executes a specialty by a wrong name he must be sued by such name, & the Execution must pursue the writ; & his right name may come in under an alias. 2 Sty 1218. Dyer 279. 1 Rolle 216. 3 Bac 617.

Formerly there was a distinction taken, between the misnomer of the Christian name, & the misnomer of the surname. If the mistake was in the Christian name, it was fatal; but if it was in the surname it was not. 6 Co 43. Co Lit 3. Dyer 279.

The reason assigned for this distinction was, that the Christian name was a name of Baptism; & as no Christian can be twice baptized, one man can have only one Christian name. This plain distinction has never been noticed in Con; & we presume would at present be ~~disadvantageous~~ disregarded in Eng. 2 Sty 1218.

A Deft is not obliged for his own safety to take advantage of a misnomer, or want of addition. For if he be afterwards sued again upon the same cause, he may plead in bar, that he is the person of whom the former recovery was had. Sho 1210. 3 Bac 625.

The same rule obtains in criminal cases. 2 Haw 369.

A mistake in the addition of a Pltff is not pleadable in abatement, except as at Common Law. That is unless he were a Knight or higher in rank; for as the Pltff appears in court, he will notwithstanding be sufficiently well known. 2 Rolle 464. 6 Mod 85. 1 Show 392. 3 Bac 618.

Yet a misnomer of the Pltff is pleadable in abatement. 1 Com 1415. (Q. naming mercantile firm.) 3 Bac 560

Matter of abatement, if taken advantage of at all must be pleaded in abatement. 6 Ho 366. 3 Bac 181. 2 H Bl 267. 299.

Notwithstanding this rule, in an action on a note, bond &c a misnomer, as it works a variance, may be given in evidence under the general issue. Yet here it is to be observed, it is not taken advantage of as a misnomer, but as a variance. 1 Ho 656. 4 H 612.

A misnomer in the declaration is also pleadable in abatement as well as a misnomer in the writ. Yelv L 363. 1 Bla 302. 3 Bac 624.

At common law a misnomer was not pleadable to an indictment for felony, as the person of the criminal, by appearing at the Bar, with uplifted hand, was made sufficiently certain. But by Stat of 1 Hen 5. it is pleadable to a criminal, as well as to a civil process. 6 Co 104. 1 Lid 40. 2 Haw 186.

3d Coverture of the Deft is good cause of abatement. Co Lit 132: 1 Lid 140: 5 Com 193.

If a Feme covert be sued alone, & do not plead in abatement, the husband may do it in any ~~stay~~ State of the proceedings; if he neglect it, he may afterwards reverse the Judgement, by a writ of error coram vobis. 5 Ho 681. 1 Bac 9.10. Salk 254. Salk 400.

But if the wife was a party to the plea, her plea of coverture must, it is said, be pleaded within the time for pleading in abatement. But this again is doubted, for according to the opinions of some, she may plead her coverture in bar. Salk 24: 4 Bac 39.

But if a Feme sole be sued, & marry pendente lite, the suit does not abate, & in such case her husband cannot take advantage of her coverture. 6 Co 323. Sho 811. Esp 328. 1 Bac 9. 2d Ray 1525.

Order would be manifestly unjust that she should be able by her own act merely, to divest another of his right.

4th If Deft cannot plead in abatement, that he is an Infant, sued without his guardian. In such case the infant has no guardian, the court will appoint him one ad litem; or if he has a guardian he may pray to have him summoned in; or the Pltff may have this done which will be to his advantage, as Judgement would be erroneous if he should recover against the Infant. 6 Co Lit 89. 135.

So in Con when a Deft has a Conservator, who is not joined with him in the suit, the Court will on motion by either party, give time to summon him into Court. Rest 174.

5 If there be but one Pltff or Deft the death of either pendente lite abates the writ at Com Law. 1 Com 330. 6 Co 509.

But when there are several the following distinctions are to be observed. In real action if one of two Plffs died, the writ abated at Com Law, but in personal & mixed actions if one Plff died after being summoned & sworn, it was otherwise. 4 Bac 40. 1. 1 Com 55. 6: 10 Co 134. Co Lit 139. Co Ll 372 a 874.

But when one of several Deffs died, the general rule of Com law was, that the writ would not abate. 1 Ver 8. Hard 151. Show 186. 3 Mod 249.

In such cases however the Plff must have suggested the Deff death on the record; for if the judgement was given against all it would be erroneous. 2 Bac 463.

In Con a Stat, & in Eng the Stat 17 Chas 2. & 9 Geo 3 remedy in a great measure the inconveniences of the common law. By the latter Stat if either one of the several Plffs or Deffs dies, the rule is, that if the cause of action be such as would continue to the surviving Plff, or against the surviving Deffs the suit does not abate. But the surviving Plffs must suggest on the record the death of the co-Plff, or the Plffs must suggest the death of the deceased Deff, & then the suit may proceed. The above Stat also provided that if there be but one Plff, & he dies after any interlocutory Judgement, if the cause of action were such as would survive to his Ex, then the suit may proceed. And in these cases the Ex &c is to enter & prosecute the action. And so is the law of N. Y. Stat N. Y.

If there is but one Deff and he dies pendente lite, after any interlocutory Judgement, in Eng or in Con; & the cause of action is such as would survive against his Ex or Ad the suit does not abate. But the Plffs Ex or Ad may take out a scire facias against the Ex or Ad of the Deff requiring him to show cause, why Judgement should not be rendered against him. And so is the law of New York. So Stat of N. Y.

If all the Plffs die at different times pendente lite, the Ex of the one who died last is the proper person, I conceive to prosecute the suit; that is, if the cause of action would survive to the personal representatives. And in such cases the his executors would be preferable to the Ex of the original Plffs who died first. So if all the Deffs die, ut supra, & the cause of action is such as would survive against personal representatives, the scire facias must issue against the Ex of him who died last.

Real actions will always abate by the death of either party when there is but one of a side; for real actions never survive to Ex &c.

But if there be two or more, the action will not abate by the death of one, if the cause of action be such as would survive in favour of the surviving Plffs in the one case, or against the surviving Deffs in the other. Co Lit 139. Co Ll 892. 1 Bac 9.

It has been decided in Con that petitions for a new trial, are within the Statute.

6 Another ground, or cause of abatement is a variance of the declaration from the writ.

It is said that the declaration itself abates the writ. And if the declaration vary from the writ in point of form only, it must be pleaded in abatement. 1 Com 37. Yelv 5: 1 Hob 246.

But if the declaration vary from the writ in point of substance, Judgement shall be arrested after verdict; for the mistake is fatal; the writ giving no authority to the Court to grant Judgement upon such a declaration. Co Ll 171. 185. 190. 722. Co Jac 651 or 657.

But this is contradicted by later authorities, when it is said in general terms, without any distinction between formal & substantial variance that the mistake must be pleaded in abatement. Ll 650. 701: 2 Will 294. 6 Mod 301.

A variance in point of form consists of such mistakes as that of giving the Deft a different name, addition &c in the declaration, from that in the writ, of the Pltff title, quality of interest &c Hob 279. Yelv 120.

If it appear from the writ itself, or the Pltffs own showing that the writ ought to abate, the Court will in many cases abate ex officio; or in other words will arrest the judgment. As if the Pltff sue for 50 acres of land & confess upon oyes that he has no right to more than 20. Cro El 121. Hob 199. 279.

So also a variance between the writ & deed, or writing, on which it is founded, is a good cause for abatement. 1 Com 244.

In Cov when there is a variance between the declaration & instrument counted upon, it may be pleaded in abatement; which is the common practice: or it may be taken advantage of under the general issue, by objecting to the admissibility of the instrument in evidence to the Jury; or having admitted it to the Jury the Deft may take advantage of it in his argument; or lastly he may demur to the evidence arising from it. Gent 104.

In Ass if there be a variance between the instrument counted upon, & the declaration, advantage may be taken of it by a demurrer to the evidence, or it may be taken advantage of under the general issue on the ground of irrelevancy; or the Deft may pray oyer of the Instrument, and after reciting it demur to the Declaration. 1 Ro 656. 4 H 512. Hob 18. 2 Will 339. Sta 1146. 2 Leon 47. Dory 208. Bull N P 313.

In Ass it cannot be thus taken advantage of by a demurrer to the declaration, after having had oyer, & having spread the instrument upon record. And this decision seems to be founded upon principle; for it is a rule of law, that under a demurrer to the declaration no exceptions shall be taken to the evidence, as under a demurrer to the evidence, none shall be taken to the declaration. Hob 106. 7. Dory 208. Bul 213.

But though a variance between a writ & deed is pleadable in abatement, yet if the deed be joint as by A & B. and A be sued alone he cannot plead non est factum & rely upon the Deds being joint; for it is his deed, tho not his sole deed, & therefore he ought to plead in abatement 2 Blk 950. 1 Ventr 34. Co Lit 203a. 5 Co 119.

If one of two partners be sued alone, ~~on a joint contract~~, advantage must be taken of the omission, by a plea in abatement, & if he do not so take advantage of it, he waives the exception. 5 Mod 2 311. 2 Blk 947. 5 Ro 651. 1 H Blk 236. Cowp 448.

But if two persons be bound by a joint contract ~~in writing~~, & one be sued & it appear from the declaration, that the other party executed the contract, & is living, judgment will be arrested. 5 Mod 264. 5 Mod 698. The mistake or omission need not in this case be pleaded in abatement.

It is a general rule applicable to all actions, that if one Pltff sue alone, when another ought to join, the Deft may plead in abatement. Co Lit 164a. 196a. 197b. 198a. Salk 4.

So also if the right of action be in one & two join, it is a good cause of abatement. ~~Co Lit 180a~~ Cro El 143. Hob 72. 1 Roll 294.

And if one Pltff sue alone where another ought to join, advantage may be taken of it under the general issue. 2 Ro 202.

And if one sue alone on contract, & it appears from the declaration that another ought to join, judgment may be arrested. 5 Co 18b.

(1) The reason for this Note is, that the ~~Dis~~ text is not matter of form but substance. —

But in an action founded on tort, if one sue alone, it can be pleaded only ~~it can be pleaded only~~ in abatement. Salk 4. 290. Lp 411. Sha 820. 1146.

7. Another cause of abatement is the pending of another suit for the same cause; but the action must be of the same kind, or at least concurrent. 1 Mod 410. 5 Co 61. 4 H 4 3a. Hob 184. 3 Ba 13.

Tho' the prior suit be commenced in another Court, yet if the two Courts have a concurrent Jurisdiction, the latter is abatable. But if the suit is commenced in an inferior Court, & during the pendancy of such suit, another action is brought for the same cause, before a Court of Westminster Hall, the pendency of the former will not abate the latter. 5 Co 62a. 2 Will 87. 1 Com 49. 50.

This distinction seems not to be founded on principle, and happily it can never obtain in Con, as our Inferior Courts have not concurrent Jurisdiction with higher.

If a suit be commenced when there was another pending for the same cause, the latter is abatable, tho' at the time of pleading the plea in abatement, the former suit was not pending; for in this case the second suit was vexatious ab initio. 1 Bac 48. Doe Ins Cas 10. The pendency of a former suit is a good plea in abatement, even if another Deft be added in the second, as it would seem. And so if one of the Defts in the first action be omitted in the second. When in the second action another Deft is included, there seems to be some uncertainty in the Books, whether it will abate to all the Defts, or to those only who were in the first action. In principle clearly it ought to abate to those only who were in the first action; yet the weight of authorities favour the idea that it shall abate to all. 1 Bac 13.14. Carth 96.7. Hob 137: 1 Com 49. Contra Lutw 272. 1 Ld 75.

If a second suit be commenced on the same day on which a former suit for the same cause was abated, it shall be intended to have been commenced subsequent to the abatement of the first, & shall not therefore abate. Allen 34. Gilb Hist Com Pleas 260. 1 Bac 14. A suit is pending from the date of the writ. Moor 1420.

In Con it is a rule, that if the first action is wholly impertinent, a second for the same cause may be commenced pending the former. And it is supposed that a second action for the same cause, ought not to abate, unless the second is vexatious. The Courts have also decided, that when the first action is wholly inapposite to the cause of action, a good second for the same cause, pending the former, shall not abate. This seems to be according to the strict rule. The second action is concurrent with the first.

It is not a good plea in abatement that a prior indictment is pending against the Deft for the same offence. But the Court in its discretion will quash the first. Yet the pending of a prior information, against the Defendant, for the same offence, is a good plea in abatement. 1 Bac 13: 2 Hawk 190. 275. 367.

If two informations are exhibited on the same day, for the same offence, each will abate the other. Hob 128. Moor 864. 1 Com 49.

But it is no plea in abatement, that a suit of the same kind, & for the same cause is pending against a stranger. Hob 137. 8: Sha 420.

8. Another good cause of abatement is the Writ not being duly issued, or not duly authenticated; as if it were issued on the 30th February. In Law, the Teste, or date is said cannot be amended. 1 Com 46. 1 Show 80. (1) In Con it is amendable. Salk 700. & 4 592.

+ In Con it is not pending till the writ is served.

So if the magistrate omit his name of office. 2 Jo 83. Salk 700. Cro El 592. 1 Sid 304.

But in this state we have a statute enacting that when no proper officer can be had, the writ may be served by an indifferent person. In this case his name must be inserted by the magistrate who signs the writ; and he must also aver that no proper officer could be had, without great cost & inconvenience; otherwise it will abate. But this averment of the magistrate is not traversable. Kirby 6.

9. If a writ have a defective return, that is, if by it be returnable within 15 days from the teste or date, it will be a good cause of abatement. Salk 63. Lutw 25. Cro El 50.

In Con if the suit is before the superior or county Court, it must have been served twelve days before the setting of the Court; if it be a foreclosure, or a foreign attachment, it must be at least 12 days; if before a single Magistrate six days, or it is abatable. In all these cases, either the day of the date, or of the return is excluded exclusively.

So in by it is said, that the day of the date, & the day of the return are not both inclusive.

If the endorsement of the service of the office be insufficient upon the face of it, it is abatable. Yet if it appear to have been executed according to law, it cannot be abated for the officer's endorsement cannot be contradicted by plea, the Deft in such case is left to his remedy against the Officer. 1 Blk R 393. Sty 813.

But in Con the writ will abate whether the defective service appears upon the face of the return or not. Here when property is attached upon mesne process, the writ will abate, unless it be made to the Deft, or an attested copy be left at his usual place of abode if within the State. Stat Con 35.

The Stat also provides that when the attachment is of land, a copy shall be left with the town Clerk, within six days from the mesne attachment; the omission of this however is no cause of abatement, as it is designed only to secure the land to the Pltff against subsequent purchasers.

10. The want of a venue in a declaration may be taken advantage of by demurrer. 5 Mac 322.

The want of a venue is a defect which is pleadable in abatement. By venue is meant vicinage, or neighbourhood, that is the vicinage or neighbourhood, in which the cause of action arose. 1 Com 45.

In transitory actions the Deft cannot compel the Pltff to change the venue by putting in a plea in abatement, but it must be on motion to the Court, that the venue be changed.

In local actions the venue being wrongfully laid is a cause of abatement. 7 Co 2b. 3a. 1 Mac 35. 1 Sid 44. Salk 669. 70.

In Con in transitory actions the Pltff may lay his venue either in the County of the Deft, or of himself. But when the title of land is concerned, the venue must always be laid in the County where the land lies, or the writ will abate, as it will if no venue is laid. Stat Con 20.

Local actions consist of three kinds. 1 Real actions, which are brought for the recovery of lands, & such as are brought for the recovery of rents for years. 2 Mixed actions, which are brought for the recovery of land & damages. 3 And such personal actions

as are brought for the recovery of Damages, for injuries done to the Land. But when the title to land cannot be called in question, the actions are called transitory.

Pleas in Abatement conclude to the writ, & sometimes to the declaration, by praying Judgement of the writ or declaration, & that the same may be quashed. 5 Bll 303: 5 Mod 132. 144.

Thus we see from its Conclusion, that the object of a plea in abatement, notwithstanding the contrary has been asserted, differs from that of pleas to the Jurisdiction of the Court, & of Pleas to the Inability of the Pltff.

Formerly when the plea was dilatory, or extrinsic, the conclusion was to pray Judgement without adding, of the V.: 1 Rac 15. 4 H 50.

It is laid down in Lucas Reports that the character of a plea is decided by its conclusion. 10 Mod 112.

But it is said by Holt that the character of a plea is determined by its beginning & conclusion. Thus if the matter pleaded would be good in bar, but it commences & concludes in Abatement, it is a plea in Abatement. But if it begin or end in bar, it is a plea in bar. 6 Mod 103. 2 Ra 593.

The opinion of Lucas is more modern & is ~~justified~~ fortified by a Case in Shower. 1 Shower 4: 12 Mod 524. Lutw 34. 36.

If matter pleaded which would be good, either in bar or abatement, begin in bar & conclude in abatement, or vice versa, the Pltff may at his election, answer it as a plea in bar, or in abatement. 1 Vent 136: 3 Mod 281: 4 Rac 50.

The beginning & conclusion of pleas in abatement, & pleas in bar, are different. Pleas in abatement begin & conclude by praying Judgement of the writ; but those in bar begin & conclude to the action, by praying whether the Pltff ought to have his action. 3 Ld Ra 11. 53. 87. 92. 107. 116.

In Con a plea in bar begins in this manner " The Deft pleads & says, that the Pltff of having his action ought to be barred, because, (stating the facts on which the plea is founded) and then he is ready to verify, (& then concludes) & therefore prays Judgement of the Court".

When a cause of abatement is pleaded, & Judgement rendered upon it, error lies as well as upon a Judgement in Chief. But an abatable defect is no ground of error, unless it be pleaded, except in certain special cases, in which advantage may be taken of it in any stage of the proceedings, as if Feme Covert be sued alone. Ld Ray 594. 2 Nolle R 53.

A plea in abatement containing matter which goes in bar, is not good, unless the defect be pleadable in abatement as well as in bar. 1 Mod 242. Co Lit 120. 9: 12 Mod 400.

14. It is also a good cause of abatement, that the cause of action at the time of the action brought, had not arisen. 2 Lev 197. Hob 199. Lutw 8. 24. 16. And if it appear on record, without plea, that the action was commenced (vi supra) before the cause of action had arisen, Judgement will be arrested, & the Deft will not be compelled to abate it. Carth 114. 2 Show 147. 6 Ll 325. Yelv 70. 6 J. 69. 70.

A Deft can never plead at the same time two causes of abatement of the same kind. 1 Rac 15. Carth 8. 9.

But several causes of abatement, if they are of a different nature may be pleaded in abatement at the same time. 1 Com 66. Co Lit 304.

As a plea in abatement does not go to the merits of the action, it is a general rule that a Judgement upon such plea is no bar to a plea to the action, unless the Judgement be in chief. 6 Co 7. 46. 4 H 43. 8 H 37. 98.

The Judgement usually rendered on a plea in abatement is this; When it is in favour of the Deft, that the writ be quashed; but if it is in favour of the Pltff it is a respondeat ouster, that is that the Deft answer over. Yelv 112. 1 Vent 22. 2 Show 42.

But if an issue in fact be joined on a plea in abatement, & found for the Pltff. Judgement goes in chief, that is that the Pltff recover. 1 Vent 22. 2 Ray 594. 2 Ray 119: 6 Mod 236.

In Cor however when Judgement is for the Pltff it is always that the Deft respondeat ouster.

But if a person be indicted for a capital offence, & plead in abatement, on which an issue in fact is joined, & found against him, Judgement in chief is not rendered as in civil cases, but a respondeat ouster. 2 Hawk 334.

There can be no demurrer in abatement, that is, the Deft cannot take advantage of merely abatable matter by demurring. Salk 220: 7 Mod 79.

This rule does not hold in prosecutions for capital offences. Hawk 334.

When a Scire facias is brought on a Judgement, the Deft shall not plead in abatement, that which he could have pleaded in abatement in the original action. Salk 2. Co Lit 203. 575. Co Lit 303.

It is a general rule, that after a respondeat ouster no plea in abatement of the other matter, will be admitted. 4 Mac 51. Salund 50 b.

This rule however is not universal; for when there is such abatable defects as would render the Judgement erroneous, it may be pleaded after a respondeat ouster. 2 Roll 53. 5 Ju 631. 6 681 Salk 400

It is a general rule that after the time of pleading in abatement is expired, or after general imparlance, (which means a continuance), matter of abatement cannot be pleaded at all. This rule is not universal; for if the matter of abatement go in bar, this matter as it goes to the action may be pleaded. So if the Judt rendered for the Pltff would be erroneous, & also if the cause of abatement has elapsed, it may be pleaded in abatement at the first opportunity. 2 Roll R 59. 3 Atk 316. Yelk 130. 1 Mac 9.

In Cor it has been the practice to try pleas in abatement without any formal answer, & that no formal answer even given to consider them as demurred to. This vague & loose practice however is at present very properly falling into disuse. Kirby. 49. —

Of the Statutes of Jeofails.

After a Judgement that the writ abate, it may in many cases be amended, which is allowed by the Statutes of Jeofails, of which there are twelve.

At Common Law as it stood about the 13th year of the reign of Edward 1st amendments were very rarely allowed. 8 Co 156. 3 Blk 407. 3 411: 4 Mod 1098.

No false latin, no omission of a word, syllable or letter was amendable after enrolment; the while the proceedings were in paper: amendments were sometimes allowed. 3 Blk 410. Salk 49: 2 Haw 192.

After a writ is amended it is considered as a new one, & new pleas or abatement will be allowed. 3 Blk 410. Salk 49. 2 Haw 192.

By divers Eng Stat, the first of which is the 4th of Edward 3d & the last, the 5th of Geo 1st, amendments are admitted in a great variety of cases. In Ct we have only two Stats on this subject called, the one the old & the other the new Statute. The first extends to formal defects only, according to the received construction, which is the same as is given to the Eng Statutes on the same subject. Hob 318: 1 Bac 96. 7: 101. 2: 8 Co 15b Cro El 644. But the Statutes of amendments, both here & in Eng; extend only to civil actions. And therefore criminal actions stand on the same ground as before the 13 Ed 1. 2 Mod 1099. Cro Ch 144. Salk 51. 4 Mac 367.

At Common Law there was no distinction between amendments in civil actions, & criminal prosecutions. 2 Mod 1099. 4 Hg 25 67. Before the 13 Ed 1st amendments were allowed in most cases, where the pleadings were improper.

The Stats of Jeofails ~~extends~~ extend to such defects only as are matters of form, such as false latin, omission of words, & misnomers &c 1 Bac 96. 7. 101. 2: Hob 168: 8 Co 15b Cro El 644.

But such defects as are not amendable, are those in point of substance, as the want of a sufficient, or the want of a proper authentication of the writ. 1 Vent 155. 173: 2 Lutw 173. Cro Ch 74: 8 Co 159.

Under our new Stat many substantial defects are amendable & indeed it is difficult to determine what are not so, the words of it being that mistakes, defects & informalities, may be amended, and these words extend to the declaration, as well as to the writ. The old Stat extends to the writ only.

In Eng, & in this State a formal defect when it is dehors the writ, may be amended, if the statement of the truth will make it good. But if a statement of the truth will not have this effect, the writ is not amendable, for an amendment would be nugatory.

Under the new Statute of Connecticut, amendments may be made by the Plff: on motion to the Court by himself, tho the Def do not plead those defects. But under the old Statute it was holden, that it might be amended of common right, & without motion to the Court. Kirby 5. 1 Root 223. It is an established rule in our practice that after leave to amend all amendable defects, may be amended, whether they be or be not pointed out by the motion, or plea.

Under the old Stat, when the Plff amended, he was bound to pay all costs, up to the day on which he amended: Under the new Stat they are paid at the discretion of the court: & our County & Superior Courts have

Seen fit to adopt different rules with respect to the subject. The County Court in Litchfield never oblige the Pltff to pay any cost on amendment, unless the Deft has been put to extra expence by the Defect amended. On the other hand, the Superior Court adjudge cost to the Pltff in almost all cases, up to the date of the abatement.

Under our new Stat an amendment may be made at any time or stage of the Pleadings

It is also enacted by our Stat, that pleas in abatement when made in the County Court, shall be made & heard before the impanneling of the Jury. But the practice is frequently, to hear them after the Jury is impannelled.

In the Superior Court, Pleas in abatement must be tendered before the sitting of the Court, in the afternoon of the second day of their session. Root 1 Ctts.

But to writs of Error, like other pleas, they may be put in at any stage of the proceedings. Tidy 289.

Of Pleas to the Action.

Pleas to the action are of three kinds. 1st Demurrer. 2 General issue. & 3d Special pleas in bar. 3 Blk 314: 8 Com 135: Co Lit 716.

1st Demurrer.

This is an admission of the facts which are well pleaded ~~stated~~ by the adverse party, but a denial of their sufficiency in Law.

Demurrer is not always ranked among pleas, for it is said to be only an excuse for not pleading; & the party demurring avers that he is not bound by the laws of the land to answer &c. 3 Blk Co 314.

A demurrer may be taken to any part of the Pleading, but is altogether negatory till the pleadings have commenced. And hence the Deft first defense by demurrer must be to the action. Co Lit 72. 5 Mod 132.

To every sort of allegations the opposite party has three ways of answering, viz. By Demurrer; by Denying the allegations; or by confessing, & pleading special matter in avoidance of them.

The the rule, as it is generally expressed, is, that a demurrer admits the facts stated by the opposite party; yet it admits those facts only which are sufficiently pleaded. 1 Salk 248. Dyer 21: 2 Rolle 16. 22. Hob 81: 5 Co 69. Salk 218. 5 Com 139.

A demurrer never confesses an averment, which contradicts that which appears certain on the record. 3 Lev 121: Co Ch 24. 35.

An averment of what is repugnant, or impossible, is never confessed by a demurrer. 1 Sid 10: 5 Com 139.

A demurrer never confesses an averment of facts which cannot be proved, as release pleaded, but not averred to be in writing. If however any contract to hold at Common Law is good, without writing, but which is required by Stat to be in writing, is pleaded, he who pleads it need not aver it to be in writing; for such Stat does not alter the mode of pleading at common Law. But if a contract not good at Common Law, without writing, is to be pleaded, it must be averred to be in writing. 12 Mod 440: 5 Com 235: 6 Co 10. 23: 2 Salk 86. 376.

A demurrer never admits the truth of immaterial or impertinent averments. 5 Com 139.

Indeed a demurrer never confesses any facts which can not traverse (by which is ~~not~~ meant not have issue by plea) even tho' the pleadings be good. 5 Com 139. Hob 51.

A demurrer is sometimes called in the books an issue in law. But this definition is not accurate, as a demurrer merely tendrs an issue in law. 4 Bac 129. Co Lit 126. 3 Blk 314. 5.

A demurrer can never be given after an issue in fact is joined. 5 Com 139. 1 Show 213.

If there be a demurrer, & an issue in fact both joined in the same cause, as there may be to different parts of the declaration; the demurrer according to the Eng practice, is regularly first to be determined; tho' it is discretionary with the court. 1 Com 136. Co Lit 72.a The reason of this rule is, that if the demurrer be first determined, the Jury on trying the issue in fact can assess damages for the whole at once; whereas if the issue in fact was first tried, & damages assessed upon it, & the issue in law was afterwards decided in the Plff favour it would be nugatory to have a second hearing by a Jury to assess the damages on the part demurred to. Co Lit 72.a 125.b

This inconvenience will never probably attend the practice in Con, as damages are assessed by the court.

When there are two issues one in fact, & the other in law, joined in the same declaration, & the issue in law is decided for the Plff, he may then enter a non prosequitur, as to the issue in fact, & have a writ of enquiry for assessing his damages on the part demurred to. Salk 219. Stra 574 5 Com 136.

There never can be an issue in fact, & an issue in law to the same part of the declaration, or plea &c; for this would draw the same point before different courts. Dyer 21.a 87.b

There cannot be a demurrer to a demurrer; for a demurrer tendrs an issue in law. But to this rule there is an exception. When a demurrer to a plea in abatement, is not opposite, the demurrer itself, may be demurred to. D No 20 Salk 219. Comb 306.

A demurrer is in this form, "That the declaration &c & matters therein contained, are in no wise sufficient in law for the Plff to have, & maintain an action, & hereof prays Judgment." The Joinder in demurrer is "That they are sufficient, & therefore the Plff prays Judgment." The forms are the same to a plea, a replication &c only mutatis mutandis. 1 Mod 132. 3 Blk Abr Cont. Co Lit 71.b Yelv 5. 6.

The Eng form of a demurrer is substantially the same as ours, with the addition of an averment, that he is no way bound to answer to the action, or allegations of the opposite party, a verification.

In Civil cases the Judgment to a demurrer is peremptory, or in Chief, unless the demurrer be to a dilatory plea. Tenk 306. Dyer 69. 341.

The same rule obtains in criminal cases when they are not capital; but on indictment for capital offences judgement is not peremptory in favour of the prosecution; for the Deft is not to be convicted, except on the general issue. But the opinions on this point are contradictory. Co Rl 196. 2 Haw 334: 11 Co 61: 4 Blk 334. 8.

Demurrers are divided into two kinds, general & special. Co Lit 72a. 5 Com 138: 4 Bac 132. 2 Ro Ab 798.

The difference between them is this. When one alledges no special cause of demurrer, the demurrer is general; but when one assigns a special cause of demurrer, the demurrer is special.

But to constitute a special demurrer, the cause assigned must itself be special. If the cause assigned be general, the demurrer will be general. Comp 297. 2 Ro Ab 798. 1 Show 242. 1 Will 219.

As by demurrers formerly were always special, & Coke says it down as a good rule, that demurrers should be special in all cases; they being opposed to the pleading demurring, & showing the Deft in demurrer in a liberal manner in what particular his plea is defective. 2 Will 267: 1 Ves 240.

A special demurrer reaches all those defects which a general one does, & many which the latter does not.

All substantial defects may be taken advantage of as well under a general demurrer as a special one; but no other defects can be reached by a general demurrer; whereas a special demurrer will reach a defect of form as well as one of substance. 10 Co 88. Latch 185. Co Lit 72a. Hob 127. 164. 5 Mod 10. Salk 291.

By a substantial defect is meant, the omission of any thing which is material to the right of action, on one hand, or to the defence pleaded on the other: That a formal defect is a deviation from the legal form, in stating those facts, or making those allegations by which the Plff would support his action or the Deft make his defence. 10 Co 88. Latch 185. Co Lit 72a. Hob 127. 164: 5 Mod 10. Salk 291.

Duplicity, or pleading of that specially which amounts to the general issue is merely matter of form.

To every plea two things are necessary. 1st That the matter pleaded be sufficient in law; & 2d That it be alledged according to the forms of Law. The omission of the former being substantial, may be taken advantage of under the general demurrer. The latter being matter of form merely must be taken advantage of, if at all, by a special demurrer. Hob 132. 164. Co Lit 303. 2 Ray 798. 802.

The distinction between matter of form, & matter of substance, is this. "That without which the right sufficiently appears is matter of form; but that without which the right does not sufficiently appear, is matter of substance. Hob 233.

When there is a total want of substance, either of the demurrers will answer. Hob 133. 1 Ld 301: 3 Salk 394. Jha 624. Co Lit 72.

A special demurrer reaches no other formal defects than those which are specially assigned for cause of demurrer. For as to all defects not assigned for cause, a special demurrer is as a general one. Yelv 10 Co 38. But it will reach all substantial defects. 4 Co 32.

No advantage can be taken of duplicity in pleading, except by special demurrer, it being in point of form only. 1 Vent 365. Co Lit 72: 5 Com 36. Contra 8 Co 810.

And it is not sufficient generally to say that the plea de is double. The demurrer should point out precisely in what the duplicity consists. Salk 219. 670: 7 Mod 71. 1 Will 219.

The rule that no advantage can be taken of duplicity, except by special demurrer, does not hold in those cases when the Plff joins two causes of action, which according to the rule of declaring, cannot be joined, & sues for damages on each as a distinct substantive ground of recovery. In such cases the Judgement may be arrested. The rule contemplates those cases only where the Plff relies on one ground of recovery only. But if he improperly inserts in his declaration, a cause of action of a different nature, on which however, as forming a distinct & independent species of recovery, he does not rely, vide post Division Duplicity.

If a plea amount to the general issue, it is ill on special demurrer, according to some opinions. But the authorities on this head are contradictory, some holding that such a plea is not a proper subject of demurrer, & that the Court, in its discretion, will on motion overrule it. 1 Lev 95. Dyer 306. Hob 127. 6 Co 17. 2 Ree 50. 2. 3.

If a declaration be adjudged ill on a demurrer, no similar or concurrent action for the same cause can afterwards be maintained on the same ground, as was disclosed in the first declaration. 6 Co 7. Co Lit 667. 8. 2 Blk Rep 779. 827. 3 Will 240. 304

But if the declaration be adjudged ill merely for want of a material allegation, which is inserted in the second, it is no bar to the second, for here the second action, tho' for the same cause, is not brought on the same grounds as were disclosed in the first; & the legal question to be discussed upon the second will not be the same as that determined upon in the first declaration.

So if a Plff for a given cause of action bring a suit, not adapted to his cause; & the declaration is adjudged ill on a demurrer, this Judgement is no bar to a different action afterwards brought for the same cause, & which is adapted to his case; for in this case the two actions are not concurrent. Co Lit 660. 2 Vent 16. 170. 5 Ray 472. 2 Mod 310. 3 Ib.

This rule holds with the same distinction, when the Plff fails in the first action, on the general issue, or a special plea in bar. Co Lit 660: 6 Co 7. 170.

It is a rule, that tho' the parties join in demurrer upon a single point, the Court judge from the whole records. 1 Hob 56. 199.

Whenever a party demurs, the proceedings are stopped, & the demurrer reaches back to, & attaches upon the first defect in the pleadings, whether that defect be of the party demurred upon, or of him who demurs; for a bad plea it is said is good enough for a bad declaration, or bad replication, for a bad plea, a bad rejoinder for a bad replication &c. And thereon if the plea in bar be insufficient, & is demurred to, yet if the declaration be also insufficient, Judgment must be for the Deft. Co Lit 133. Salk 450. 9. 640. Hob 56. 199. Ld Ray 1080. 2 Burr 79.

So if the plea in bar, & replication, be both insufficient, & the latter is demurred to, yet the declaration being good, Judt must be for the Pltff.

There is however one exception to the rule, "That Judt upon demurrer attaches to the first defect in pleadings". If an action be brought on a bond conditioned for the performance of contracts, or of an award, & the Deft plead a frivolous plea, & the Pltff in his replication, do not state a sufficient breach; on demurrer to the replication Judgment will be for the Deft. For in cases of this kind, the statement of the cause of action is not complete, till the breach be alledged in the declaration. (1)

Of Demurrer to the Evidence.

In certain cases, when the pleadings terminate in an issue in fact, a party may take the examination of the cause, from the Jury to the Court, by demurring to the evidence of the opposite party, that is, the evidence by which he means support his issue. 6 Bac 136. Co Lit 72. 1 Allen 18. 7 Rep 404. Nul Ab. 313. & Con a demurrer to evidence must be made before the party demurring produces any evidence. Jones 170.

The relevancy of evidence, is always a question in law, & to be decided by the Court. But the point of relevancy being established, its weight is determined by the Jury. 2 H Blk 205.

A demurrer to evidence puts an end to the question of fact, & opens to the Court the application of the law to the facts shown in evidence; for a demurrer admits the facts, but denies their sufficiency in law to support the issue. 2 Jones 146. Co Lit 72: 2 H Blk 205. 6.

When parole testimony is circumstantial, that is not direct, but collateral to the point in issue, the adverse party is not permitted to demur to it, unless he distinctly admits every fact upon record, that is every fact, & every conclusion to prove which, the circumstantial evidence is relevant. 2 H Blk 207. 9: Doug 114.

In the authorities last cited, it is said, that every fact & conclusion, which the Jury might have found, shall be considered as admitted.

Unless the party demurring, make the admissions required by the foregoing rules, the party adducing the evidence, is not bound to join in the demurrer. Nul Ab 313. 1 Allen 18. (2)

(1) Written evidence may universally be demurred to. 5 Co 104. 2 Salk 701. 2 Blk Co 27. So also in parole proof according to the other opinions. 5 Co 104. 1 Leo 87. 6 Co 72. Cro Car 11. Cro Jac 11. 2 H Blk 246.

(1) When the Plff replies, surrejoins, & it then appears that he has no cause of action, he should never have judgement tho' the bar or rejoinder be insufficient: nor can any admittance of the other party make it good, for the court must judge from the whole record. But if the bar is bad in substance, & the replication only in form, the Demurrer will attach to the bar. 8 Co 133.

(2) If a Demurrer to evidence had been improperly noticed, it might I presume, have been the subject of a bill of Exceptions. C J Eyre 2 H B 209

If the party demurs & the other joins in the demurrer then parol testimony may unquestionably be demanded to. Coll 752.

The point put in issue by a demurrer to the evidence, is, whether or whether it be sufficient in law to support the issue. And hence the reason which supports the above distinctions, with regard to the admission of the facts, which the evidence goes to prove.

For if evidence which is relevant be introduced to prove any special fact, the question whether the evidence proves the fact, is matter of fact; but whether the fact itself when proved, or admitted, supports the issue is in many cases matter of Law. Bull N P 313. Doug 213. And unless the facts were admitted, agreeably to the above rules, before an inference of Law could be drawn from them, it would be necessary to draw an inference of fact, which can be done by a Jury only.

Under a demurrer to evidence, no advantage can be taken of a defect in the Pleadings. Yet after a Judgement, that the evidence is sufficient, a motion may be made in arrest of Judgement, for the insufficiency of the Pleadings, as on a special verdict. Bull N P 313. Doug. 213. 218.

It may be made a question in Con, whether under a demurrer to the evidence, advantage may not be taken of a defect in the Pleadings. When a general issue is closed to the Court, the Court is a Judge of the law, as well as of the facts. They therefore consider the pleadings & will give Judgement against him who has committed a mistake in them. And the case of demurrer to evidence, it is believed, stands on a similar footing.

When one party offers to demur to evidence of another, the party demurred on, may always refer it to the Court, whether he must join, which is not allowed him, when any part of the pleadings are demurred to. And if there be no colourable cause for demurring, the demurrer will be overruled. Bull N P 313.14. Allen 18. 2 H Blk 208. 2 Rolle R 117

If on demurrer to evidence which is loose, & indeterminate, without admitting it to be true, or to circumstantial evidence, without admitting the facts which it induces to prove (as ante) the party demurred on join in the demurrer there can be no Judgement; for in the cases supposed, the facts are not ascertained upon the record. There must therefore be "a venire de novo". 2 H Blk 209. Bull N P 313.

It has been decided in Con, where there was a statement of the evidence, most of which was in writing, that on a demurrer to that evidence, the opposite party need not join therein. But this decision, as has been asserted, is evidently repugnant to principle. 2 Swift 257.

Before the above decision was had, our Superior Court had determined, that a demurrer to parol evidence, before a single Justice, need not be joined in by the opposite party. Kirby 352.

The mode of demurring to evidence is, by spreading it on the record, alledging that the evidence thus adduced, is not sufficient in point of law, to support the issue, & praying Judgement that the Jury may be discharged from giving any verdict. Bull N P 314. 2 H Blk 200. & 20.

On a Demurrer to evidence, & a joinder in Demurrer, it is common for the Jury to be dismissed immediately; tho' they sometimes assess damages for the Pltff conditionally. Cro Eli 143. Ld Ra 60. Prem 410. Salk 284. Stra 212.

In Case if judgment on the Demurrer, be found for the Pltff, the Court assess his damages

If one offer to demur to evidence, & is overruled by the Court, he may file a bill of exceptions. 9 Co 13b. Co Ent 341. n 249. 1 Ven 326. 2 H 1 B 209

The admission of inadmissible evidence by the Court, is no ground for a demurrer to evidence; for if it were, it would go to the interlocutory Judgment, which would be absurd. Salk 284. Bull N P. 314.

2 Of the General Issue;

The issue is defined to be a single, certain, & material point, issuing out of the allegations of the parties, & consisting regularly of an affirmative, & negative. Co Lit 125a. 7 Com. 142. 2 Bac Ab 13.2. (1)

It is necessary according to the old strict rule, that there should be a direct affirmation, & negation; & not a bare contradiction. Vent 213. Co Lit 126a.

This rule however has in some measure relaxed; for it has been holden of late, that if there be two affirmatives, directly contradictory, they may constitute an Issue. Yet it is much the safer way to make an affirmation, or negation. 1 Salk 6. 2 Stra 1179. 4 Bac Ab. 8 Ed 27.

The general issue a general plea as it is sometimes called, is a denial of all the material facts in the declaration, & is never pleaded, but by the Deft. 5 Bac Ab Cov 365.

From this definition of general Issue, it is not to be understood, that the Deft must thereby deny all the facts contained in the declaration, but he may deny them; for he may admit some, & deny others by such plea.

A Special Issue is one which is taken on some particular part of the declaration, or on some special matter alleged. And every issue in fact, except a general one, is a special one. 5 Com 142. Co Lit 126a.

In any action brought for a misfeasance, the proper general issue is, not guilty: & so to actions for any non feasance arising ex delicto. Co Lit 257. Skin 280: 3 Mod 224.

The proper general issue to debt on simple contract is, nil debet. To debt on bond or other specialty; non est factum. To debt on record; nul tiel record. To account; never bailiff or receiver. To Assumpsit; non assumpsit. To replevin; non cepit and the Statement; not guilty in Hy: 7. and no wrong or disseisin.

Not guilty was formerly held to be a good general issue to the action of Assumpsit, it being an action of Trespass on the case, but such plea would now be bad, on special demurrer, tho' it would be cured by verdict. 1 Lev 142. Sho 172. Sip. 167.

In Case the general Issue to Statement, is, no wrong or disseisin. The general issue always contains the words "manner & form" — as thus "the Deft is not guilty in manner & form as alleged by the Pltff in his declaration."

(1) But when the tenant or defendant may plead the general issue, thereupon the general issue pleaded, he may give in evidence — as many histories matters to bar the action or right of the demandant or Appellee as he can. Co Lit 304.a

Issues in fact always conclude to the ~~to the~~ Country, by which is means the ~~country~~ Jury. 8 Mod 324. Salk 280. 2 Ra 1. 6 Co 257.

When either side traverses, or denies the facts pleaded by his antagonist, he usually tenders an Issue. If the traverse or denial comes from the Deft, the issue is tendered in this manner, "and of this he puts himself upon the Country for trial." But if the traverse lie upon the Plff, he tenders the issue in another form, as "& this he prays may be enquired of by the Country." Co Lit 126. 3 Mk 313.

When a penalty is inflicted by a penal Statute, for which an action of debt is brought by an individual "nil debet" is a good plea. Yet it seems that "not guilty" is also a good plea. Hob 56. 6 Co 257. 1 Ro R 452. 4 Co 42. 2 Show 1022. Sty 167. 4 Ra 463.

The general Issue goes to the count, or declaration, & not to the writ. 4 Bac 56. Co Lit 126.

An issue always closes the pleadings, & when it is well tendered it must be accepted by the opposite party. 3 Mk 314. Comb 86. Carth 88. Co Lit 126.

The words "manner & form" are sometimes words of substance & sometimes of form only. The rule of distinction is this, when the issue goes to the gist of the action, the words are of form only, in which case they do not deny the manner in which the facts are stated to have taken place, but merely the facts themselves. But when the Issue is taken upon a collateral point, arising out of the new matter, which the Deft has alledged, they are words of substance, & deny the manner in which the fact is averred to have taken place, as well as the fact itself. Co Lit 281. 4 Bac 56.

An immaterial issue, is one joined on a point, which does not decide the merits of the cause; & is therefore a defect not aided by verdict. Carth 371. 6 Co 227. 2 Ra 1. 8 Mod 137. 10 Mod 19.

An informal issue is a defect in point of form only; & therefore is cured by verdict. Carth 371. 6 Co 227 &c. 1 Bac 103. 1 Lev 52. 2 Mod 132.

Notwithstanding the general rule, that the general issue or denial of all the material facts in the declaration, in some cases it may be pleaded when no one of the facts, is intended to be denied; as when a specialty is void, from the absolute incapacity of the obligor. When, for example, an action of debt on bond is brought against a feme covert, the general issue may be pleaded, & the Defts coverture will support it. In this case the general issue is non est factum. Salk 7. 2 Wms 1082. 6 Mod 311. 12 Ra 609. 3 Ket 228. 1 Bos & Pul 97. 2 Wms.

But if a specialty be void in its own nature, non est factum is not, on this account, a good plea. The special matter which renders it void, ought to be pleaded: — as usury for example. And so also if a contract be void, from an incapacity which is not absolute as that of Infancy. Then infancy ought to be pleaded; for to support the general issue of non est factum, on the ground of an incapacity in the obligor, it is requisite that the incapacity be absolute. Gilb L Ev 163. 6 Ra 313. 5 Co 119. Salk 675. 3 Bos 1805. Show 490. Hob 72. 166.

It is a general rule, that if a specialty or legal solemnity be made void by stat, the special matter must be specially pleaded, as it will not support the general issue. 5 Co 119a Hob 72.

If an action be brought on a specialty, which has undergone an alteration, or erasure "non est factum" is a good plea, & the alteration or erasure will support the issue. But this rule must be taken with the following qualifications.

If such alteration, or erasure be made by a stranger in an immaterial part, & without the privity of the obligee, the deed is not vacated. Therefore the plea of non est factum would be ill. 5 Co 119. a Hg: 11 Ha 27a —

But if the alteration be even in an immaterial part, the instrument would be vacated. But if any alteration be made by the obligee, or by his procurement, even in an immaterial part, the instrument is vacated.

In actions of assumpsit any thing, which shows that the Pltff has no right of recovery, will maintain the plea of non assumpsit. 2 Rolle 682. Sra 498. 2 Ld Ra 707. 2 Burr 1010. 1884 Esp 167. — Whether this rule holds in Express assumpsit is not clear. (2)

The reason given for this looseness in pleading is, that the action is not stricti juris & being an equitable action, any defence which shows that the Pltff ought not to recover is proper evidence under the general Issue. 4 Bac 60. 8 Mod 18.

There is generally no distinction taken in the books which lay down the general rule, between the plea to the actions of special assumpsit, & indebitatus assumpsit. But it is holden that the statute of limitations, or an accord with satisfaction cannot be given in evidence under the general issue of non assumpsit because such a defence ~~contradicts~~ contradicts the plea & does not go to the gist of the action, but to the discharge of it. Quere — For it is settled, that a release, or even payment may be given in ~~payment~~ evidence under the general issue of non assumpsit. Salk 278: 3 Bac 510. Esp 147. 262. (1)

The meaning of the plea non assumpsit is not necessarily that the Deft never promised, but that he is not liable at the time of pleading. 1 H Blk 105 Doug 108.

I apprehend that the statute of limitations would now be allowed in bar to be given in evidence under the general issue of non assumpsit.

This looseness of pleading does not obtain in torts.

2 Rolle 682. 5 Mod 252. Hob 74 n 171. 5.

It is laid down by Lord Mansfield with respect to actions of Trespass on the case generally, that "they are not stricti juris, any thing which shows that the Pltff has no right to recover need not be pleaded, but may be given in evidence under the general issue. 3 Bur 1353. But this is not true in this action. Libel for Slander & that, Prosecution & malicious must be pleaded.

(1) It is laid down as a reason why the Stat of Limitations may be given in evidence under the Genl issue in Debt & not in Assumpsit, that Nil Debet relates to the time of pleading, and that Non Assumpsit to the ~~time~~ original cause of action, the one that he is not indebted at the time of the plea the other that he never was indebted. 1 Atk 298. But a release or payment relates to events subsequent to the promise, & if that is the meaning of the latter plea, it is as much a contradiction of it as the Stat of Limitations.

(2) It is necessary reason that the Stat: of Limi. should be pleaded. This defence does not show that the Defendant in strict & conscience ought not to pay. Usur may be given in evidence under the General issue ~~that~~ in assumpsit. But to a Deed it must be pleaded, for it has been laid down that any specialty or legal instrument is made void by a Stat it must be pleaded.

(1) The reason given is, that the plea of Nil debet means that he is not indebted at the time of pleading, whereas nil assumpsit is said to mean that he did never promise. That the case of a release & payment will stand agt. this reason. 1 Salk. 278 (1) 7 Mod 127 it is said that it is not a subject of special Demurrer but will be set aside on motion. Pr. 10 Co 95c it is said that it is a subject of Demurrer if the Deft will not waive the gent. form.

Advantage may always be taken of the Statute of frauds & perjuries under the general issue by objection to parole evidence 1 Bro Ch 92.

In Con under the general issue any thing may be given in evidence to any action, which shows that the Pltff has no right of recovery, except some ex post facto act of the Pltff operating as a release or discharge to the Deft. Kirby 239.

By one Stat any thing may be given in evidence under the general issue, which goes to show that he never had a right of action.

In Eng if an action of debt, on simple contract be brought, the Stat of limitations may be given in evidence under the general Issue of nil debet; tho' in an action founded on tort, the Stat must be pleaded. (1) 2 Salk 278. Lep 262. 2 Ra 666.

But in Con the Stat may be given in evidence under the general issue to both these actions, as also to the action of Assumpt. Notwithstanding a contrary position is held by Mr Swift.

A special plea amounting to the general issue is not improper but if it contain special matter of justification, it is good, even tho it amount to the general issue. 3 Leo 41: 1 Wms 249. n ~~246~~. Hob 127.

When it does not contain matter of special justification, it is a good objection to a special demurrer in certain cases, tho' according to some opinions not in all. 10 Co 95a. Jenk 316. 6 Ch 112. 157: 5 Bac 202: 2 Mod 274: 5 H 18. Hob 127. — (2)

If if the Court on motion doe allow the plea, & order the general issue to be pleaded, & the Deft will not plead it, but join with the Pltff in demurrer, judgement shall be for the Pltff. 10 Co 95a. 4 Bac 134.

If the Pltff may take judgment by nil dicit in such a case, instead of demurring. 5 Bac 202. 3: 6 Gr 165.

It is not to be supposed from the above rules, that pleading specially what would support the general issue; necessarily amounts to the general issue. A plea of payment or release to an action of Assumpsit for example, does not amount to the general Issue, tho' the payment &c might have been given in evidence under the general Issue. Carth 356. 2 Ray 217. 566. 707. 6 H 71. 2 Salk 294. 394. And hence it is that in Con, it is usual to plead ex post facto matter, which abrogates the cause of action, & which would support the general issue specially.

It is a general rule that no plea which admits that there was once a cause of action amounts to the general issue, tho' the matter pleaded might have been given in evidence under the General Issue. 2 Ray 217: 4 Bac 62.

Notwithstanding a special plea which amounts to the ~~the~~ general issue is improper, yet it is warranted in an issue

or action of trespass, by giving colour to the Pltff, as when the Deft states his title specially, & at the same time gives colour to the Pltff that it supposes him to have an appearance or colour of title, tho' indeed in point of law but of which the Jury are not competent Judges. Co Ld 172: 10 Co 88. 90.1: 3 Blk 309.

A special plea containing a statement of facts sufficient to prove the general issue, & concluding with the general issue, is good. Such a plea is called a general Issue with an ifsue. 1 Ventr. 210 Ro 66. Sk 394. Such general issue must always conclude to the Country. & according to some opinions, it may conclude with a verification. 1 Ro 26: 1 Ventr 9. Plow 66: 2 Roy & Roy 172. Gilb Ev 164. 5 Co 64 Mon 30

Pleading a general issue with an ifsue, is in some respects advantageous, as it prunes out the special grounds of defence, & opens to the Court the question of law arising upon them. Gilb Ev 104.5.

Lord Holt says, that all general Issues with an ifsue, are impertinent, since in consequence of them the onus probandi rests on the Deft. 6 Mod 210.
But by this he does not mean that the Deft cannot take advantage of them if he chuses.

3° Of Special pleas in bar

A Special plea in bar, is always, as the term imports, a special plea. It is sometimes called a plea in bar: & it is defined to be one which admits the facts stated in the declaration, but avoids them. Dyer 66: 4 Bac 2.

This definition so far as it relates to the admission of the facts stated in the declaration, is not universally true; tho it is in general accurate; for sometimes, tho' not frequently, a plea in bar traverses [illegible] of the declaration. Lut 381: 4 Bac 70: 2 Vent 79. Co Ld 30.

So much is true however, that a plea in bar always admits all traversable facts, which it does not traverse, & is always intended to avoid those which it admits. Salk 91: 4 Bac 2.73.

A Special plea in bar advances some new matter, that is matter not disclosed in the declaration, & it is usually in the affirmative. 3 Blk 309.

All pleas which form a complete issue, conclude to the Country. 3 Com Dig. 7 Ray 98 Carth 88.
Yet when a special issue is formed in a plea in bar, by its traversing a part of the declaration, that issue may conclude to the country.
And it is provided, by our Stat, that an issue in fact may by agreement of the parties conclude to the Court. Stat Con 27.

But every plea in bar, must conclude with a verification, and not to the Country, for every party who alledges new matter, must give his adversary an opportunity to reply. 3 Blk 309.

The party against whom new matter is alledged in any stage

of the pleadings, must have an opportunity to defend himself, in either of three ways; by denying the facts, by demurring to them, or by replying in avoidance of them, some other matter. 3 Bl 309. H. 301.

All pleas admit of course, what they do not deny. Hence nil debet is not a good plea to debt on bond. For by this plea the execution of the bond is admitted, & no discharge or satisfaction is shown. Hard 332. 4 Bac 82.

The most general rule laid down, with respect to pleas in bar, is, that every party plead such pleas as is pertinent & proper according to the quality of his case, estate, or interest. But this rule is too general to afford the student much assistance. Co Lit 283. 303.

A plea in bar must always answer the whole gist of the action; for if it does not, it is demurrable. In an action brought against a common carrier, for the loss of goods which he was to keep, & carry, if he pleads a discharge from keeping & carrying the plea is ill. Cro El 28: 3 Lev 375. Hob 327. 28. Ld Ra 229. 3 Ld 576. 2 Bulst 414.

But a justification which answers the whole gist of the action, covers all matters of aggravation, & therefore supersedes the aggravation. 3 Ta Rep 292 & 6. Tho' it do not expressly answer the aggravation. Cro El 555. But the plff in his discretion may answer over, the aggravating circumstances by a novel assignment.

It was formerly necessary for the party in his plea to set forth specially all the facts of his defence, consisting of special matters of avoidance however minutely they may have been. Co Lit 303: 8 Co 133

Now general pleading is allowed to avoid prolixity, that is the Deft is allowed to state generally the special matter which tends to avoid the Pltffs action, if a statement of all the particulars would greatly burden the record. Co El 749. 916: 1 Sid 215. 334. 2 Bent 256. See Covenant & other further rules upon this subject.

But in an action for non performance of covenant, if some of the covenants be in the negative, it is not competent to plead performance generally; for a negative cannot be performed. For there he must plead specially, that he has not done the acts against which he has covenanted.

Repugnancy consists of a contradiction between different parts of the pleadings, or allegations which are made by one & the same party. The rule is this; If the party allege any thing contradictory to that which he has before alleged, in a point which is not material, it does not vitiate his pleading; & particularly after verdict. 1 Lam 292. Co Lit 303. Co El 377. 549. 610. Carth 288: 1 Show 28. This rule applies to all the stages of the of the pleadings. Co Jas 428. But if the repugnancy be in any material point, it is a fatal mistake & is not aided even by verdict. Plow 232. 362: 7 Leiand 282. & the pleading must be construed most strongly against the party who pleads it. Co Lit 303: 5 Com 32. 71: Plow 26. 202.

It is also a general rule, that that which already appears upon the record, need not be averred by him who would wish to take advantage of it. Co 40: 11 Co 24. 9 Co 124.

Nor is it even necessary to aver any thing which appears from implication.

Averments contradictory to any thing which appears certain on the face of the record, are nugatory. 2 Wms 5 : 5 Com 155.

Every plea must be direct, & not argumentative. Thus in an action of debt, it is not sufficient to state, that it appears by a certain instrument &c; he must directly aver the fact, that the Deft is indebted to him. Dyer 42.3. 118. Co Lit 223. 2 Ro 458.

So also if an action be brought against several, & the Deft plead in abatement, that one of the several was dead at the date of the writ; a replication that he is alive, without directly traversing his death, is ill; tho' possibly it may soon be estimed good. 1 Will 6. Stra 1177.

As often can be given upon a negative pregnant, as an affirmative pregnant. Therefore a plea, consisting of a negative pregnant &c is ill. A negative pregnant is one which implies an affirmative; an affirmative pregnant is one which implies a negative. But such pleading is cured by verdict, & Demurrer is ill only on special Demurrer. 6 Ro 87. 312. Co Lit 126. 280 2 Lev 197. Hob 126.

A contract which is not good at Common Law without writing, must, when pleaded, be averred to be in writing. 6 Co 38. 1 Sid 175. 1 Vent 61 : 12 Mod 540 : 1 Will 376.

But if a contract which is good at Common Law without writing, be required to be put in writing by Statute, it need not be averred to be in writing. For such Statutes do not alter the rules of pleading at Common Law. Bull NP 279. 12 Mod 540.

In the last rule however, there is an exception.
If a contract which is good at Common Law without writing, but which is required by Statute to be in writing, be pleaded in bar to another action, it must be averred to be written. For the Deft shall not deprive the Pltff of a clear right of action, by pleading a collateral contract in bar, unless he shows that the contract pleaded is one on which an action could lie. 7 Ro 450. Bull NP 274.

If a contract or conveyance, which is unknown to the Common Law, being created by Stat, & is required to be in writing to be pleaded, it must be averred to have been in writing. For in such case the different Common Law rule would have existed. 12 Mod 540.

There is a general rule that all things must be pleaded, according to their legal operation. Thus for example, a conveyance by one joint tenant to another must be pleaded as a release, & not as a feoffment. For one joint tenant cannot enfeoff his co-tenant. Co Lit 195b. 200b. 1 Vent 70 : 1 Ld Ray 246. 2 H Blk 11. Co Ll 502. 7 Ray 107.

Of a Traverse

A Traverse in pleading, is a denial of some particular point alledged in the pleadings by the opposite party. It always tendeth an issue, & may be taken in any stage of the pleadings. Yelv 195. Cro Eli 282.

It is said down in one of the authorities cited above, that a traverse closes the issue. But the proposition is not true of a truly technical traverse; for it is a general rule, that such a traverse does not close, but merely tendres an issue. Stra 871. 1 Burr 321. Doug 412: 6 Co 24. 5 Com 109.

A traverse which is strictly & technically such, is always by an absque hoc which words constitute a negation of what follows, that is of those allegations which are traversed. And such traverse generally concludes with a verification. But a general traverse, that is one negating the whole substance of what is alledged by the adverse party, may & generally ought to conclude to the Country. Salk 4: 1 Ld Ray 105. Co Ch 117. & 164. 2 Tr Rep 439. Plead & Issues 447. 2 Tr 443. 4 Bac 67.

Yet in many cases such general traverse may conclude with a verification; tho' in what particular ones seems not to be precisely ascertained. 2 Tr Rep 443.

Tho' the matter which follows an absque hoc is thereby denied, yet the manner of that negation, & its conclusion are entirely different from those of a negation by a direct denial without an absque hoc, which is not strictly a traverse, & which always closes an issue, & concludes to the Country. A direct denial may always be made of a material fact, that is one which is decisive of the action in any stage of the pleadings. But the facts not thus denied, should be demurred to. Stra 871. 1 Burr 321. 7 Rep 98. 4 Bac 67.77.

But when the allegations of one party do not form a complete issue, but are merely inconsistent with the allegations of the other, it is proper for the former to traverse the allegations of the latter, & indeed, according to the general rule, must conclude with a technical traverse. 1 Sid 301: 2 Vent 212. Co Ch 30. Dyer 312. 1 Leon 98: 2 Mod 160. A direct affirmative & denial tendres a mere demurrable. 14, 98. Stra 871. 1 Burr 321. The new matter which precedes the traverse by way of refining is in, & called the inducement to the traverse.

But when one confesses, & by alledging new matter avoids what is stated by the other party, his allegations are not inconsistent with those of the latter, & therefore he neither need, nor ought to conclude with a traverse of them. 2 Mod 168. 4 Bac 70.

It seems that the omission of a traverse when necessary is a substantial defect; & may be taken advantage of by a general demurrer. 2 Mod 160 contra 1 Leon 43. 4. 4 Bac 70.

It is a general rule, that when one party tendres a traverse properly, that is on a material point, the other tho' the issue in which it is contained allege new matter must join upon it, or in other words, when on a material point a traverse is tendered

The opposite party may not desert it, & tender a new traverse upon the same point; that is the same cause of action or ground of defence. Co Lit 282. Hut 97. Hob 104. 1 Saund 120.

Hence the rule that there cannot be a traverse upon a traverse; which means, that when a traverse is tendered by one party, the opposite party cannot leave it, & tender another traverse upon the same subject matter cause of action, or defence as is contemplated by the former. 5 Com 119. Hob 104. 7 H Blk 403.

But a traverse after a traverse is proper, viz! the first be on a material point, that is, when a traverse is tendered by the party, the other may desert it, & tender another traverse on a different subject matter. Cro Jac 101. Co Lit 282 b. Hob 104.

A traverse upon a traverse therefore is defined to be one which goes to the same subject matter as the former, & a traverse after a traverse to be one which goes to a different subject matter from that of the former. Hob 104.

But to the rule that there cannot be a traverse upon a traverse, there are two exceptions.

1st When one party tenders a traverse upon an immaterial point, the opposite party may waive it, & tender another traverse upon the same point, that is, upon the same subject matter, whether it be the cause of action or ground of defence. 7 H Blk 403. 411. Sp Fro 117. Co Lit 282. Carth 186. Hob 104. 1 Wms 99

2d If a Def who is sued in trespass, plead a local justification in a different County, & traverse his fault in the County in which he is sued, the Plff need not join in the traverse; but may in reply traverse the local justification. This rule is intended to discourage local pleas which are false. Cro Jac 101. Co Lit 99. 410. 1 Wms Saund 380: 2 Lutw 14. 27.

When a traverse is tendered by one party, the opposite party closes the issue by affirming over verbatim what the other has traversed, & concluding to the Country. Salk 49. 3 Bl Rep 125 [illegible] But as the party joining in a traverse is in general obliged so to do, he does not thereby admit the new matter alleged in the plea containing the traverse, but on the other hand the party tendering the traverse, does admit all that which he does not traverse; for he can traverse what he pleases. Salk 90. 4 Bac 68.

Yet the admission of facts not traversed may be avoided so far as it respects any future question or claim, which might otherwise arise from them, by protestando. A protestando is defined by Coke to be an exclusion of a conclusion; that is, the party by thus obliquely denying, saves himself ~~the~~ from a conclusion, which in some future case might be made against him, from those facts which he does not admit, & which it is not convenient for him directly to deny. 3 Salk 311. 12.

A protestando does not oblige the opposite party to prove the facts protested against. It is not a plea nor is it

intendes to avail the party protesting, in the action in which it is used; its office being merely to prevent the facts protested against, from appearing in evidence upon record in any future question. Co Lit 126: 5 Com 126: 3 Blk 371. 372.

A traverse can only be taken on some issueable point, that is, on some material point of fact. Therefore an immaterial point of fact, or any point of law can never be traversed. Co Ch 442. Hob 103: 5 Com 117. Litt 111. Blk 628. Hob 103. 1 Ven 103. Co 2 221.

It is generally true that matter of inducement cannot be traversed, yet when it is material, & is followed by a traverse, which is immaterial, it may be traversed. 1 Ld Blk 356. 2 H 55. 3 Mod 320.

But matter of inducement to a traverse can never at Com Law be traversed, if the traverse which follows the inducement be taken on a material point. At Com Law therefore the inducement, except when by way of protestation, in a traverse after a traverse, seems to be of no other use, than to usher in the traverse.

But in Lex it is said, a practice has been introduced, sub silentio, of deserting the traverse, & joining issue upon some material point stated in the inducement.

If a traverse be not taken upon a single point, it is called multifarious, & is bad. But tho' a traverse must be taken on a single point, that is, cause of action, or defence; yet it is immaterial of how many particulars that single point is formed. It does not necessarily consist of a single fact. 1 Wms 320: 1 Lev 40. * Advantage may be taken of it only by special demurrer.

One party can never traverse that which has not already been alleged by the opposite party; for the office of a traverse is to tender an issue upon some matter already alleged by the opposite party. 2 Wms 79. Salk 620. G. 2 Roll 3. 1 Ld 235.

But it is said in Leonard that if matter be ~~alleged~~ traversed, which has not been alleged, it can be taken advantage of only by special demurrer. Lut 935. 1560.

A traverse should always be taken on some point, which if found for the party traversing, would totally destroy the opposite cause of action, or ground of defence. Comb 321: 6 Co 24. 2 Saund 5. 20. 1 Roll R. 23.

When a Deft justifies, or in any other way confesses & avoids a part of the declaration, & would rely as to the other part, upon a traverse, the traverse must be co-extensive with all that part, which he does not confess, & avoid. Hob 104. 2 Mod 60. Salk 622: 1 Ld 293. 4. 5 Com 109. Esp 415.

Hence it is, that in an action of Trespass, if the Deft would plead a release upon a certain day, he must traverse his guilt ~~upon~~ during the whole time subsequent to the date of the release, & precedent to the teste of the writ. If a feoffment, the whole time

precedent to the feoffment within which the plff is allowed to prove a trespass. And if a license for a particular day, the whole time precedent & subsequent to that day within which the Plff is allowed to prove his suit. Yet if the Deft plead a special justification upon the same day with that upon which the trespass is laid to have been committed in the declaration, the plea is good. But in such case the Plff may in his replication make a novel assignment if he rely on a trespass to which the justification does not extend. 1 Wms 130: 5 Bac 206: 3 Lev 42.

So also if a Deft pleads a special justification on a particular day, tho' not the same on which the declaration states the trespass to have been committed, & in the close of his plea alledges the trespass complained of to be the same with that justified, he need not traverse his suit at any other time. The opinions on this point however are not agreed. 1 Wms 130. 8 Co 228 a 165 Lutw 1457. Contra 1 Vent 104: 4 Vent 270. In Com it is allowed. 5 Bac 207. Lev 641

A traverse is usually taken in the very words of the allegation traversed, but even then it will sometimes be insufficient, as when the allegation is, that the Deft obstructed three ancient lights & the Deft pleads a traverse thus, absque hoc, that the Deft obstructed three ancient lights. This traverse would be bad because a negative pregnant, implying that he did not obstruct three, yet he did two or one. 4 Bac 98.

Of Duplicity

Every plea must be simple and entire, connected & confined to a single point; that is, it must contain only one single ground of claim or defence. 3 Blk 311.

Yet this single point may consist of an indefinite number of facts. 1 Wms 320: 2 Bac 68

A violation of this rule works what is called duplicity. Co 5 Com 65. Co Lit 304a.

A double plea is one which consists of several distinct & independent matters alledged to the same point, & requiring different answers. Co Lit 303. 4: 5 Com 65.

It is essential that these distinct matters be alledged to the same point.

Distinct Counts in one declaration, tending to establish one right of recovery, do not constitute duplicity. 3 D Ray

A Count is a narration of the facts which constitute the cause of action, a ground of complaint. It is sometimes called an exposition of the writ.

When there are several distinct complaints or causes of action inserted on one record, each one is called a Count, & all of them taken together constitute the declaration.

But although the insertion of several Counts in one declaration does not amount to duplicity, yet if any one of the Counts contain several distinct, & independent matters requiring different answers, it may be demurred to for duplicity. 1 Jo Rep 274: 8 Co 87. Com 333: 1 Lev 301.

Different Counts inserted in one declaration which require different pleas, & different Judgements, totally vitiate the declaration, so that Judgement may be arrested for that Cause. Surplusage can never make a plea double; for there must be two distinct & material matters alledged in order to make it double. 1 Sid 175. 9 Jac 42. 1 Rol 661 in Ct.

Duplicity is a fault which can only be reached by a Special demurrer, which as has been remarked must point out the particulars in which the duplicity consists. Salk 219 pl 4 G. 678. Lake 332: 7 G 8: 7 Mod 71.

This rule does not apply to those cases, where the Plff joins in his declaration distinct causes of action, which according to the rules of declaring, can not be joined, & which he relies upon as forming distinct, & substantial grounds of recovery. In these cases the declaration is ill, even after verdict. (note) Salk 10. 7 Ray 233: 3 Lev 99.

But there are cases in which advantage may be taken of a Plffs stating different causes of action, of different natures in one declaration, only by a Special demurrer. Co Ch 14 a 20. 1 Ont 365. The cases which fall within this rule are those in which the Plff relies upon one ground, or right of recovery only, as in Broke & Baxter, where he joins different causes of action, which according to the rules of declaring can not be joined.

In debt on a penal bond, the assignment of more than one breach of the condition, is duplicity at Com Law; for one breach works a forfeiture ~~at Common Law~~ of the whole penalty. It is therefore useless to assign more. 5 Com 36. 1 Roll Ab 112. 2 Ont 198. Com R 137.

In an action of Covenant however the Plff may assign as many breaches as have happened; since he can recover for no more than he assigns. 4 Bac 131. 2 Saund 397. 4 Bac 121.

But now the Common Law rule as to an action on bond is abrogated by Stat. 4 Bac 121.

And in Common Courts of Law are empowered by Stat to Cancel down a bond to actual damages, & therefore as in an action of Covenant broken, the Plff may allege as many breaches as there are.

But by the Stat 4 & 5 Ann, a Deft may with leave of Court, plead as many distinct defences, as he pleases to one action. 3 Atk 308: 4 Bac 121.

The above Stats contemplate no other pleas, than those to the Plffs declaration.

Of a Profert.

It is a general rule that when a party pleads a written instrument, he must make profert of it to the Court. In Eng. it is made thus, "& the said ⊀ brings here in Court". In Cons. thus; "now ready to be shewn". This averment is called making a profert. 3 Blk 22.

There are three reasons why this profert should be made; 1st That the opposite party may have oyer of the instrument. 2d That he may take a copy of it. 3d That the Court may inspect it. 6 Co 38: 10 H 93. Hob 233. 5 Com 128. 6 Ch 143. 1 Bulst 119

The rule that when a written instrument is pleaded, the party must make a profert, is not universal: for when the right will pass without a deed it is not necessary. 1 Bulst 119. 6 Ch 143.

Yet tho the right would pass without deed, if the Plff will plead it, & make title under it, he must make a profert. 6 Co 38a. 2 Mod 64.

A stranger to a deed may always plead it without a profert. The rule applies only to parties & privies; for a stranger is not supposed to be possessed of the deed. 10 Co 94: 2 Show 410: 5 Lev 83. Plowd 149.

A person who acquires a right by mere operation of law, is under the necessity of making a profert in pleading a deed to one, from whom the right is derived. Hut 305. Co Lit 225: 5 Co 75. As in case a widow who sues for dower.

There is an exception to the first general rule under this head. Where the deed is lost by time, or accident, or when it is in the possession of the opposite party, it is not necessary to make a profert. 5 Co 74b. 75a. 2 Ja 151: 2 H Blk 263. 1 Ld Raym. 8 Mod 10. In Com as in Eng, it is usual to make a profert of a written instrument when pleaded; but our Courts have decided that it is not necessary; because the opposite party is entitled to a copy of the instrument pleaded, without profert.

At Com Law the omission of making a profert when necessary, was matter of substance, & therefore bad on general demurrer, if not on motion in arrest of Judgement; but now by Stat 16 & 17 Ch. 2 & 4 & 5 Ann, it is matter of form only & can be reached only by special demurrer. Co Ja 32 Co H 217. 7 Mod 301. If the deed is only inducement to the cause of action or defence; it need not be profered. Nor the party does not make it a ground of action. 10 Co 92. Ja 573.

Of Departure.

Another fault in pleading is Departure, that is, a dereliction of a former defence, for another which is distinct from the former, & which does not tend to fortify or support it. It is a general rule of pleading, that every subsequent stage of the pleadings, must support the stage immediately precedent, by the same party. Thus the replication must support the declaration, the rejoinder the plea, the rebutter the replication

The same butter the rejoinder. Plow 7. 305. 2 Roll 22.
Co Lit 303. 4: 1 Lev 81: 1 Roll 376. 469. 512. 2 Ro 144 G. Hob 422.
A departure is a substantial fault, & is clearly reached
by general demurrer. Salk 221. 7 Ro 2:90: 8 Co 86. Sty 472. 6 Co 165. n 200.
It has however been holden in one case, that this defect is
defect is cured by verdict, but this case may be supposed
to stand on its own particular circumstances, the
departure not being pon matter which was the gist of the
action. 7 Ro 86.

So also if the matter first alledged by one party be
pleaded as at Com Law, a second plea supporting it by
a special custom is a departure. 3 Lev 48.

If one plead a Statute in his own favour, & his opponent
pleads that the statute is repealed, & the former replys that
it is revived, it is no departure. 1 Lev 81.

But in an action of Covenant for divers acts, if the Deft
plead performance, & the Plff states one particularly which
is not performed, & the Deft then pleads a tender of performance,
it is a departure. Co Lit 304. 2 Com Dig. Salk 222. 6 Mod
115: 4 Bac 125.

It has been decided by our Superior Court & affirmed
by the Supreme Court of Errors, that when the Plff stated
a tender to have been made in Norwich, & the Deft plead that
a tender in order to be of any avail must have been in Phila.,
a replication that tender was made in Philadelphia is a
no departure, because it is immaterial where the tender is
stated to have been made, the Plff being allowed to prove
it in any other place. It is doubted however, whether this
decision is warranted by by principles. Salk 222: 6 Mod 115:
4 Bac 125.

If the first plea rests the defence upon Com law & afterwards
upon cus[illegible] in [illegible]. 1 Lev 81. Roll [illegible] 469. 512.

Of Arrest of Judgement & Repleader.

Arrest taken in its legal sense is a term synonomous
with Stay. Arrest of Judgement is the preventing of Judgements
being rendered generally, tho not always, after a recording to the
verdict. Bac Goo. Doug 213.

A by judgement is arrested for intrinsic causes, that is such
as appear from the face of the record; as when the declaration
varies totally from the writ, one being for debt, & the other case;
when the verdict differs materially from the issue; or
when there is a total insufficiency in the declaration. 3 Salk 393.

It is a general rule, that when the statement which the Plff
makes of his title, or a Deft of his defence, is defective, verdict will
cure the defect. But when it appears that the title or defence itself
is defective, verdict will not cure the defect. Doug 658. 2 W Blk 201.
Co Ch 497: 4 Ze 472. 3 Blk 395. Salk 365: 3 Bac 1728. Bull 320.

Verdict regularly cures all artificial defects, which are the omission of such things as the party need not prove. 1 Bac 101. 2.

But natural defects are not favorable, tho' they are sometimes, cured by verdict. Natural defects are the omission of such statements as the party must prove. And these are cured by verdict only when the court will intend the facts omitted to be stated by the party, were found by the jury.

The plea of not guilty is not aided by verdict for the Deft. 3 Salk 395. 6 Ll 770.

After verdict, a motion in arrest of judgment will be supported by any thing which may be assigned for error after judgment, that is any thing which may be assigned for error, in that particular case after verdict, & judgment. For in issue in law many things which would have been cured by verdict, may be assigned for error. 5 Com 177: 2 Roll 718. 6 Co 45: 1 Salk 77.

It is an invariable rule, that any defect in the pleadings which will support a motion in arrest after verdict, must be such as would have been fatal on general demurrer. Hence the defect of substance is total, & it appears that a good declaration could not have been made. 3 Salk 394.

But this rule does not hold e converso; for verdict will cure many defects which might have been reached by a general demurrer. Thus if the declaration & omits some particular circumstance, without proving which the Plff could not recover, it is bad on demurrer, but good on motion in arrest. The presumption after verdict is, that it was proved; as in trespass when the day is omitted, or an impossible day laid, & when such defect is cured by verdict. 8 Salk 393. 7 Ve 518. Carth 389. 10 Mod 292. 1 Ve 545. 127. Doug 658. Hard 118. 2 Ray 810. Salk 100. 6 Ch 497: 1 Mod 169. Carth 930. Stra 212.

So in the case of bridges under our statute, when notice is necessary in writing.

So in any case when notice in writing is a condition precedent to the Plff right of recovery. Doug 658. 4 Ve 472. Nel 320.

So if the performance of any condition precedent is not averred, judgment may be arrested. 4 Bac 16: 7 Co 10. 5 Com. 45: 1 Ve. 645: 7 Ib 125. 2 Salk 574: 2 Bac 900.

Nothing is presumed to have been proved after verdict, but what is expressly stated, or necessarily implied from the facts stated. 1 Ve 148. Kirk 403. Doug 658. 2 Ray 810. 1 Vent 17: 1 Bac 101: 7 Ve 523.

A verdict cures all formal, or artificial defects upon the ground that the opposite party waived all exceptions by omitting to demur specially thereto. But when it cures material defects, it is on the ground, that the jury have found the facts omitted, which the court will presume; as the omission to state any, or a particular day in an action of trespass; or an omission to state notice in a proper manner in trespass.

Those defects which are not cured by ~~Judgment~~ verdict, on which ever side they be will support a motion in arrest of Judgment. Therefore an omission to state the fact of the action, will support a motion in arrest of Judgment.

But there are some cases in which Judgment will not be arrested for any the greatest possible mistake or defect. There are when the court can clearly perceive, from a view of the whole record, that the party in whose favour the verdict is found, ought to recover. A motion in arrest of Judgment, like a demurrer, brings upon issue in ~~Judgment~~ Law. Viz whether the party against whom the motion is made ought to have Judgment or not. To determine the court will scrutinize the whole record. Therefore a motion in arrest of Judgment by a Pltff will not be supported by a plea totally defective of the Deft. if the declaration were also good for nothing, because in such case it will appear that the Deft ought to have Judgment, a bad plea being good enough for a bad declaration. Hob 56. 199. 200. 4 Mod 131. 2 Ld Ra 1080.

But if in such case verdict had been for the Pltff, the Deft notwithstanding the badness of his plea, might have arrested the Judgment.

When a motion in arrest of Judgment is made there being no verdict in the case, it will operate like a demurrer. It will always prevail when the defect would have been reached by a general demurrer; for there is nothing without a verdict, to cure such defects. 2 Mod 300.

Judgments are often arrested by reason of the immateriality of the issues on which they are grounded, but not always. If the Judgment be arrested a repleader is generally awarded, but not universally; for if the Court from a view of the whole record can determine what ought to have Judgment a repleader will not be awarded, but Judgment will be given for him who ought by the record to have it. Yet a repleader will always be awarded when it does not appear from the record which party is entitled to Judgment. Suppose a declaration & plea in bar are both sufficient, & that the Pltff traverses in his replication an immaterial point of the plea in bar, which is found in his favour, Judgment will be arrested & a repleader awarded. Stra 694. 5 Mod 395

But suppose the plea in bar to have been wholly insufficient, and that the Pltff joins issue upon any part, or even the whole of it, which must be immaterial, & the verdict be found in favour of the Pltff. He cannot prevail in a motion in arrest of Judgment, because it will then appear from the record that the Pltff is entitled to Judgment.

A repleader is never to be awarded, when by pleading de novo no material issue can be taken, as when the plea in bar is wholly insufficient, & the issue is taken upon any part of it.

A repleader is never to be awarded for a defect, which cannot be cured by pleading anew. 1 Roll 301. 5 Com 355. Hob 56.

Suppose in the last case above stated, that is when the plea in bar is wholly insufficient, the immaterial Issue taken by the Pltff had been found for the Deft. Then the Judgement would have been arrested. A repleader however would not have been awarded, but the court, on the prayer of the Pltff would in direct opposition to the verdict, have given him Judgement. 4 Co 10: 8 Co 133. Salk 578. 2 Ra 924.

It seems a distinction has ~~been taken~~ obtained with regard to awarding the repleader when an immaterial issue has been taken, from the character of the party applying thereon. For a repleader is never granted in favour of him who tendered the immaterial Issue, because no one shall take advantage of his own ~~wrong~~. Cawley ups. Dory 300. 7 Ld Ld. 544.

Thereon such Issue, the he in fact ought to prevail, cannot have Judgement, unless his right appear upon record.

A repleader is a pleading de novo which commences at that ~~stage~~ of the pleadings, in which the first deviation from the established rules of pleading occurred. Salk 579. 7 Ra 458: 3 Kel 664. 6 Mod 2.

A repleader is never awarded after a demurrer, that is after a judgement on demurrer. Pop 42: 5 Co 52. Latch 148: 6 Mod 102: 3 Lev 20. 440.

If a repleader is awarded when it ought to be denied, or if it be denied when it ought to be awarded, the judgement is erroneous, which be reversed by a writ of Error. Latch 579. 6 Mod 2.

A repleader can never be awarded after a Discontinuance, or default. Salk 579. 6 Mod 3. Carth 371: 2 Lev 32.

At Common law it was frequent to award repleaders before verdict. But at present they cannot be awarded till after trial; for now many faults are cured by verdict. 7 Kel 664: 6 Mod 2. Carth 371: 2 Lev 32.

In Civil Judgements are arrested, not only for intrinsic causes, as in Ly but also for those which are extrinsic, that is for matters dehors the record, as partiality, misconduct, or intemperance in a Juror, or misconduct in the party who obtained the verdict.

These causes would also lay a foundation for a new trial here as in Ly. But in Ly nothing extrinsic to the record will support an arrest in Judgement.

When Judgement is arrested for extrinsic causes in our Courts, a rehearing, that is a new trial is granted, & not a repleader as is asserted by Mr Swift. 2 Swift 264. Kirby 13. 133. 184.

Any incompetency in a Juror which goes to his ~~incapacity~~ impartiality is in this State a cause of arrest of Judgement, if the incompetency would support a principle challenge. Kirby 13. 105.

If a person stand in such a degree of relationship to one of the parties in the cause, as would disqualify him for a Judge, it will support a principle challenge & will thereon support a motion in arrest of Judgement. Kirby 279.

A motion in arrest of Judgment will not be supported by the incompetency of a Juror, which does not go to his impartiality. Nor if it does go to his impartiality, will it be cause of arrest, if the party against whom the verdict is found had previous of the incompetency. 1 Swift 232.

If a Juror has given a previous opinion on the merits of the cause, it will regularly support a motion in arrest of Judgment. Yet if it appear upon examination that it did not influence the verdict, or that the party making the motion had knowledge of that opinion before the trial, it will not support the motion. Kirby 62.

A previous opinion concerning a rule of law given by a juror is no disqualification, tho' the same rule apply to the point in question, it is therefore no cause of arrest. Kirby 427.

A defect in the verdict found is in some cases a good ground to arrest Judgment, as if the Jury find only a part of the issue, omitting any part which is material. Co Lit 227. 6 El 131. 3 Lev 62. 2 Ra 1521. Stra 844. 1089.

The mode of proceeding in the above case is, that a venire de novo be awarded, that is, that a new jury be impanneled; but if the Jury find all the substance of the issue, Judgment shall not be arrested. Co Lit 227. 1 Vent 27. 12 Mod 5.

So also if a verdict vary materially from the issue, that is, if the Jury find instead of the issue something foreign to it, Judgt shall be arrested; but if it only vary from it in form, Judgment shall not be arrested. Ent 151. 3 Lev 396. 2 Rolle ab 707. 719.

A verdict is not vitiated on account of more being found, than is contained in the issue, it being merely surplusage, for utile per inutile non vitiatur. 2 Rolle 717. 6 Co 57. 2 Jl 407.

If the Pltff declaration contain two Counts, one of which only is sufficient, & on a plea which goes to the whole, the Jury find for the Pltff & assess entire damages, the Judgment may be arrested. But if the damages be severed, Judgment will be arrested on the bad count only & the Pltff shall have Judgment. Bull N P 8. 3 Will 377. 10 Co 130. 1 Ju 538. 542. 2 Jl Blk 1210.

But the first rule does not hold in criminal cases; for in these the Jury do not assess damages, nor inflict the punishment. They merely find the prisoner guilty, or not guilty. If he be found guilty, the Court will inflict the punishment on the good count only. 2 Ken 905. 2 Hawk 627. Salk 384. Doug 703.

When Judgment is arrested after verdict for defect in the pleadings, no costs will be allowed on either side; for the party moving the arrest might have taken the exception upon trial. Salk 579. 2 Lent 296. 1 Ju 267. Doug 99. But if defect in verdict thro' the misconduct, the rule apply.

If a motion in arrest of Judgment for extreme Causes be made, the other proceeds to the rehearing, it is said, has the whole costs allowed, so that in this case the last rule does not apply.

But this rule it is supposed cannot be universal; for if the Judgment

is amended on receiving of the consent of the parties when
prevails in the remedy, clearly that party ought to have costs
on the first trial only, the last having arisen wholly from his own
transcendent.

If a motion in arrest of Judgement be improperly allowed
to overrule, a writ of error will lie. But if the party moving in
arrest finally prevails no costs will be allowed him, even on the
original suit. He ought to have made the motion before that time.

A motion in arrest of Judgement can be made in any
suit for intrinsic causes. But in many cases the verdict is set
aside for extrinsic causes, but not by reason of the insufficiency
of the Pleadings. Cases of this kind fall under the head of new trials.
5 Bac 283. 291-2. 7 Lev 205.

In Cov when the issue in fact is put to the Jury, no
motion in arrest of Judgement can be made, for the Judgment
is immediate on finding the facts. Besides the Court judge of the
Pleadings as on a general demurrer. 2 Swift 264.

It is the province of the Jury to find facts only, & of the
Court to decide on the legal operation of the facts so found.
When the Jury make a conclusion of their own from the facts found,
the Court may treat it as a nullity, & make their own conclusions
from the facts, & give Judgement accordingly; for they are not bound
by any such conclusions made by the Jury. 11 Co 10. Dyer 362.
Hob 53. b.

In Eng a motion in arrest of Judgement must be made,
if at all, within the four first days of the term next after the
trial, & in Cov within twenty four hours after verdict. 3 Blk 393.
Ruf 23. The Form of a motion of arrest of Judgement in Cov is this
in substance for to be the case of the Deft. Now the Deft in
Court, after verdict, but before Judgement, moves & prays that no
Judgement be rendered thereon, because he says the Pltff declaration
& the matters therein contained, are wholly insufficient in
law, to entitle him to a Judgement; The form is the same
Mutatis mutandis, in the case of a Pltff.

Of Bills of Exceptions.

A bill of exceptions is a statement of facts annexed to
the record, for the purpose of laying a foundation for a writ of Error.
The statement consists of ~~some~~ facts not originally appearing upon
the record, but which are the foundation of some interlocutory
Judgement which the party, against whom the Judgement was
supposes to be erroneous. It is called a bill of exceptions because
it contains exceptions to the interlocutory Judgement. 3 Blk 372.
1 Bac 325. 4 Bac 136; 9 Co 13.b

This mode of founding error was unknown at Com Law, &
was introduced by St West 2d 13 Ed 1st. 1 Blk 312. 1 Bac 315. 2 Inst 426. 9 Co 13.
Dal 89 315. 1 Dal 324.

We have no stat upon this subject, but have adopted the Eng Law. Kirby 168.

A bill of exceptions being to found a writ of error, cannot be taken except in a Court from which a writ of error lies. Things cannot be taken as Courts not of record. ~~Eng 2 Inst Inferior Courts here.~~ Wall 316. 1 Mac 327.

If a party offer to demur to evidence, & be overruled, he may file a bill of Exceptions. 1 Mac 320: 4 Ill 126: 9 Co 13. Co Lit 249. a 301.

If evidence objected to be admitted, or rejected, a bill of exceptions may be taken. 1 Mac 326: 2 Lev 237. 2 Sid 276. Wall 310. This is also a ground for a new trial. 1 Mac 326.

But if the Judge admits the party's evidence, a bill is not allowed, because he did not direct the ~~Jury~~ how to find upon it, as to find in favour of a record which is conclusive against it. Wall 406. If opinion be asked when in the opinion of the Party, it ought to be ordered, or ordered when it ought to be denied, a bill of exceptions may be taken. 1 Mac 325. 2 Wall 427. Dyer 231. 2 Ray 286.

So in cases of allowing a peremptory challenge of Jurors. But in an interlocutory Judgment, relating merely to practice, a bill of Exceptions cannot be taken; as on a Judgment relating to the continuance of a cause, compelling a party to plead, ordering or refusing to order bonds to prevent &c.

So when a Decision of any kind is discretionary with the Court, a bill of Exceptions cannot be taken, as when the decision relates to the granting of new trials; imposing terms on granting them &c. If these Decs is not mediable, of course a bill of Exceptions would be improper. Wall 316. 1 Mac 327. Kirby 41.

A Bill of exceptions may be taken in all Courts, where Judgments are liable to be reversed in Error; except B R; C B — & Exchequer in Eq

Some cases however oppose the idea as to B.R. the proceedings being coram rege. 1 Mac 326. 2 Jones 107. 2 Lev 237. Skin 356. Contra 2 Show 207. 147. Wall 313.

In Con it may be taken in the Superior Court, the County Court, & Justice Courts, the Form Rules being as to the latter. Kirby 289.

Bills of Exceptions are not allowable in prosecutions for treason or felony. For the Judges are Counsel for the Prisoner, & must see that Justice is done him. It is said; But this is an extraordinary reason when the Bill is founded on a supposed mistake of the Court. The true reason, I apprehend, is, that the delinquent shall not be twice put in jeopardy for the same offence. Such cases are not within the term "frivolous exceptions" in the Stat of Westminster 2d. 1 Mac 325. Sid 24. 1 Lev 60. 1 Lut 394. 2 Ray 286. Lil 15.

It has been made a question whether Bills of Exceptions are allowed on indictments for offences not capital. But it is now settled, it having been once allowed on an indictment for trespass.

1 Bac 325. ~~Lev 24. 1 Lev 68. 1 Keb 394.~~ 2 Hawk 428.
1 Lev 88. Keb 15, 1 Leon 5, 1 Vent 366. Bull 316. Kirby 269.

Regularly when a bill of exceptions is allowed, the Court will not suffer the party to move in arrest of Judgement, on the point on which the bill was allowed, having once given their opinion; & the party's remedy is by direct writ of error. 1 Bac 327. 2 Lev 237. 2 Jon 117. 1 Vent 366. ~~Cro Car 17.~~

This rule is sometimes dispensed with in the Court of Kings Bench. Bull 316. 17.

The object of the bill being to draw before a higher Court, a Judgement on some collateral point, it is regularly not allowed with respect to the general merits of the case. That is, to draw the whole matter into a further examination. A Bill therefore made after Judgement, & containing a general statement of the facts & arguments, is inadmissible, tho sometimes practised. But in Eng if the Court below allow it, the Court above will abate the writ of error. Bull 316. 2 Mod 266. 2 Swift 276. 2 Sa Kirby 339. 486–97. 1 Wil 565. Cro 161. 3 Ta 547.

In Eng the Bill is authenticated by the signature of the Judges, or of one Judge. 1 Bac 325. 6.

The Bill must contain a statement of the interlocutory Judgement, & of the facts on which it was founded. If the facts be truly stated, the Judges are bound to certify, that is to sign it, but otherwise not. Bul 316. 1 Bac 326.

If the Judges refuse to sign, a writ lies, on the stat of Westm 2. commanding them to sign it. 1 Bac 326. 2 Lev 237. Bul 316.

In Con it is certified by the Chief, or presiding Judge.

Query. Does the writ above mentioned lie in this state?

In Eng the Bill must be tendered, or at least the substance of it reduced to writing at the trial. Salk 288. Holt 301. ~~Salk 288~~

In Con the party must give notice of his intention to file one, or move to file one, when the cause of exception arises. And the Bill must be filed in twenty four hours after verdict recorded, in case of trial by Jury, & within twenty four hours after Judgt. when the trial is by court; & always before the Court rises. 2 Lev 275. Root 569. 570.

In Con the common practice is to state, not only the interlocutory Judgement, & the simple facts; but also the grounds of the objections & which were taken at the trial.

A Bill of Exceptions is not a supersedeas of the Judgement, but merely enables the party to obtain a supersedeas by writ of Error. 1 Bac 327. 12 Mod 609.

Form of a Bill of Exceptions.

(County, &c) Bill of Exceptions. A vs B, a Action of — Plea of — on the trial of said cause, the Pltff &c offered in evidence &c Deft objected (stating the grounds) Court decided in favour of the Pltff, & now the Deft excepts &c & prays the Judge to certify &c ——— This becomes part of the record, & lays a foundation for a writ of error.

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Of Writs of Error.

A Writ of Error, is a commission to Judges of a higher Court, to examine the record on which Judgment was given in the Court below, & to affirm, or reverse it accordingly to law. 2 Bac 187. 3 Blk 407. Jenk 25. 2 Inst 40. Yelv 209.

In England the Writ of Error does not summon the Deft in Error to appear &c. He is summoned by Scire facias ad audiendum errores. 2 Bac 207. 216. 3 Blk appendix

But in Con the writ contains a command, or summons to the party, to appear before the Court to hear read the false records of the Court, whose Judgment is complained of as erroneous; and to do what shall be enjoined by the Court. 2 Strat 276.

When founded on a mistake of the Court below, a writ of Error is brought for the reversal of such Judgments only as are rendered on some point of law appearing on the face of the record, & not to reverse an error in the determination of facts. 3 Bac 19. 6 H 233. Owen 142. Dyer 55. Plow 27. 1 Lev 233. 3 Blk 407. 5 Com 286. 1 Rolle 746.

By the terms "writ of Error" without more, is regularly meant one of the above description, that is one founded on an error appearing on the record. 1 Bac 187. 3 Blk 407.

If in the writ, the Plff in error can recover or be restored to any thing in the nature of Debt or damages, or any thing real, as land, it is considered as an action, & release of all actions will bar it. But it is not so when it is only to recover a Judgement of reversal, & cost incurred below. Co Lit 288. 2 Bac 187. 215: 8 Co 52. 1 Rolle 788. 2 H 405.

There is a species of writs of Error founded on matter of fact, dehors the record. This lies to Courts of Law capable of trying questions of fact; but not to others; as the Exchequer Chamber. Co J. 5. 1 Vent 207. 2 Lev 38. 2 Bac 215.

Or it may be brought in the Court in which the Judgement was rendered, & then it is called a writ of Error coram vobis, as when Judgement is against a feme Covert alone, or against an Infant without his having appeared by guardian. Yelv 58. 4 Bac 39. Carth 122. 179. 367. Co J. 2. 3 Bac 151-57. 190. 217-18. 220. 3 Com 177. 1 Vent 207. 5 Com 330. 286 n 326. Salk 260. 1 Rolle Rep 53.

Lie if the Plff or Deft be dead when Judgement is rendered. 2 Bac 210. 4 H 143. 7 Mod 59. 5 Com 286. Carth 330-9.

Lie if the Judge who gave Judgement, was interested in the cause. 3 Com 177. Stra 639.

Lie from Ex, & recover as Executor of J.S. the latter being alive. 3 Ho R. 129. 5 Com 286. 1 Rolle 744

A writ of Error will not lie on an Judgement of a Court not of record; as a County Court. Co Lit 288. 2 Bac 194.

Nor will it lie on any decree, or sentence of Chancery, tho it being a court of record. 5 Com 286. 2 Bac 194. 1 Roll 744. Raym 230.

That on a judgment given in the petty bag office in Chancery it does not lie in B.R., for this Court proceeds according to the Common Law. 2 Bac 164. Rolle 764. Dyer 315. Mod 170 & 2 in a court of record.

It lies on judgment of non suit. Dyer 32.a Stra 236. 1 Bl 453. 1 Rolle 90.

It does by Stat. but lies on a decree or sentence of Ship. or on judgments rendered in Courts of law. Stat Ca 102.

Assigning Error in Law & in fact together, is in Eng all; for they upon different trials; matters of fact being tried by Jury & matters of law by the Court. 2 Bac 217.10. 1 Com 300. 1 Rolle 761. 1 Sid 149. Lev 105. Ray 231. 1 Vent 252. Yelv 50. Sid 93. Ray 59. & 69. But tho' the matters of fact, & of law, are blended in the assignment of Error; yet if the Deft in Error plead "in nullo est erratum, in mendo" he loses the advantage of the double assignment, & generally confesses the error in fact. He should demur. 2 Bac 216. 217. Carth 338. 9. Vent 252. 1 Lev 6. Salk 268. 6 Mod 113. 206.

But it is said, that a general demurrer cannot reach the defect, tho' the defect is called duplicity. 2 Bac 218. Carth 338-9.

So assigning several errors in fact, amounts to duplicity; but it is otherwise when several errors in law are assigned. 1 Com 300. Fitz 17 R. 20.

If an Error in fact be well assigned, it should be traversed; "in nullo est erratum in mendo" confesses it. 2 Bac 218. Lev 93. Ray 59. 231. 1 Com 305. Yelv 57.

But if it be ill assigned, "in nullo est erratum" does not confess it. Co Ent 12. 26. 251. Ray 231. 1 Rolle 90.

It has been decided by our Supreme Court, that assigning in fact not properly, together with sufficient errors in law, does not vitiate the writ. This was on special demurrer. Kirby 29. 30.

In another case, on a plea in abatement, founded on the blending of errors in law & in fact, the Supreme Court ordered the assignment of the errors in fact to be struck out, & reversed the Judgment, for the errors in law. Root 262. 2 Swift 277.

The assignment of error, which contradicts the record, is not good, as that the Court did not sit on the day of the date of the Judgment; that the Judge died before Judgment; or that the Plff in error did not appear, when his appearance is entered of record. 2 Bac 218-9. 1 Rolle 757. 762. Co Lit 12. Co Ent 560. Yelv 264. 1 Rolle 762. Dyer 89. Cro El 469. Ray 231. 5 Com 301. Salk 267. Kirby 154.

In some of these cases, does the plea of "in nullo" &c confess the assignment. (Vide Supra)

When error in fact is assigned, the proper conclusion of the assignment is with an averment "hoc paratus est verificare" 1 Ven 412. Carth 367. 1 Com 300. Contra Yelv 50. 2 Bac 218.

In the two last authorities it is held that the conclusion should be to the Country.

It is a general rule that for error in fact, (vel supra) a writ of error coram vobis lies, as in the case of feme covert, & infants (ante) 5 Com 286. 1 Roll 747. 2 Bac 218. 4 H 34. 3 Com 179. 215. Salk 400.

So if one sue & recover judgement, as the acts of J S J S being alive. 1 Roll 261: 2 Lev 38. 1 Vent 217. Co Ent 75.

But in general, if the error be in law, error coram vobis does not lie, in civil cases; nor according to the better authorities in criminal ones. 2 Bac 215. 1 Com 286. 1 Lev 208. 2 Bac 215. 1 Lev 149. Cont Roll 746.

An exception however is to be taken to this rule, when the error in law is occasioned by defaults of Clerks of the Court, or Sheriffs, or other officers of the Court. Roll 746. 2 Lev 21 K 21.

Therein coram vobis lies for error in law. Since in these cases the error does not proceed from any fault or mistake in the Court, it is not strictly an error of Judgement; for if were the fault of the Court, error coram vobis would not lie. 5 Com 286. ~~2 Bac 215 Viner Err.~~ 1 Roll 746 1-4. 2 Mod 106.

If error be in the process; error coram vobis lies, for there is not an error in the Judgement. 5 Com 286. 2 Bac 215. Viz 1 B 21. Pope 181. 1 Roll 746. 1 4.

It was formerly the rule, that a writ of Error, tho' brought on the interlocutory Judgement could not issue, till final Judgement; for the party after interlocutory judgement against him. 1 Roll 747

But in Eng it seems now settled, that the latter, may be before final Judgement, tho the return must be after. 3 Bac 199. 1 Vent 255. 8 Mod 308. Salk 153. 1 Lev 104. 466.

In Eng the old rule prevails; & our Courts have decided, that an agreement of the parties, should not supersede the rule. Roll 181. 290.

Final Judgement cannot be received. & a writ of Error be brought on interlocutory judgement.

It is a general rule in Eng, that when a judgement is joint, against several, all must join in a writ of error. And if one reverse then must be summons & severance. So an entire judgement must be reversed in toto, or not at all; as it would be inconvenient that each should have a separate writ. But if parts of a judgement in separate, it may be reversed in part, as for example; the part relative to Cost &c & affirmed as to the rest. Salk 366. 1 Roll 747. Com 290: 2 Bac 190 g. 3 Mod 134. 1 Str 109. 2 H 868. 1 Str 190 g. 202. Kirby 116.

So according to our decisions, if the judgement is severable, as if it be erroneous as to part of the cost, as when there should be no cost than damages. Rose 130.

Our superior Court, & Court of Errors, have reversed a judgement in part, & affirmed it in part, that is, they have reversed it as to some Defts, & affirmed it as to others, to whom the judgement — was joint against them. Kirby 114. Curtis 2 Bac 220. 190 — g. Roll 776. Co J. 209.

No person can bring a writ of Error, except a party, or privy to the first Judgement, as heirs, grantees, Executors, & Administrators the same rule holds as to Defts in Error. 2 Blk 355. 5 Com 291. 1 Roll 746 g. 55. 2 Bac 195: 6 Mod 1: 1 Lev 317. 2 H 56. 1 Lev 251. Viz 1 B 107.

Viz. and rule that no person, tho' a party can reverse a judgement unless the error be to his disadvantage. 2 Bac 195 — 99. 220. Hob 90. 5 & 39. 2 H 59.

Therefore if one of several Defts obtains Judgement, he cannot join in a writ of Error to reverse the Judgement rendered against the others. They alone must bring it. 2 Bac 199. 1 Lev 210. Hob 70. Stiles 190.

This last rule is to be understood with exceptions, when the error is the fault of the Court, & when it alters the manner of Judgement; as when there is an omission to amerce the party against whom Judgement. where he ought to be amerced. So if on a verdict giving damages & costs Judgement is entered for damages only. In these cases, the Judgement itself is defective, that is incomplete. 2 Bac 220: 8 Co 54. Rolle 759. 3 J. 211.

It is a rule in Cor. that when on reversal the Pltff recovers, enter in the Superior Court for trial, he must do it in the same term in which the Judgement was rendered. Root 85.

A writ of Error in the Superior Court, must be brought in the county in which the original Judgement was rendered. Root 250

It has been decided in Con, that two Judgements rendered on the Courts of a like kind, & depending on similar principles, as two Judgements on rules of Hand may be joined in a writ of Error. Kirby 160.

According to our practice a writ of Error must be signed by the Judge of the Court to which it is returnable. 2 Swift 277.

In Con, if on mal tiel record the copies differ, the Court will order the original record to be brought up. Root 88.

It seems to have been formerly held, that showing a writ of Error to the adverse party, operated as a supersedeas till four days (for obtaining from the Clerk of Errors an allowance of it) had expired 2 Bac 210. 2 Keb 19. 1 Vent 255.

It seems now that it is no supersedeas till the allowance. 2 Bac 190. Barns 376. 1 Ter R 200.

The allowance is a supersedeas only for the four days ~~signed~~ after Judgement signed — the time allowed for putting in bail. If bail is then put in the Supersedeas continues, otherwise not. 1 Ter R 200 note.

In by the bond given (by Statutes Jac 1. 13. 1605. Car 2nd & 3 Car 1st) with two securities, double the amount of the Judgement. 4 Bac 672. 3. 1 Bac 212.

In Con if a sufficient bond is taken, the writ of Error is a supersedeas of the Execution; otherwise not.

This bond is to secure all damages, debt, interest, costs &c; & all which the vendeesman may become liable. Judge R— supposes the case of nonsuit, tho' no supersedeas, without bond. Sed quere de hoc. This rule relates to Execution not executed. Impl

In Adm. where the Pltff is in Error, may have a supersedeas on the writ of Error without bond. 4 Bac 672: 3 Br Ch 350.

The writ of Error becomes a supersedeas in the officers hands by a copy being delivered to him.

There is no rule settled in Con as to the time of pleading in abatement of writs of Error. The practice has been to admit them within the time allowed for other pleas. Kirby 209. 90.

If the writ of Error abates, or is discontinued by default of the Pltff in Error, a second one is no supersedeas. 4 Bac 674. 1 Keb 658. 686. Lath 263. 2d Ray 67. Comb 19. ~~392~~ 392. 392. 393. 393.

It is said that if a Plff in error be nonsuited, he shall not have a second writ of Error. Salk 263.

But if the writ of Error abate, or is discontinued by the act of God, or by the death of the Plff. or by Leg of the Chief Justice &c a second may be a superseded. 1 Ld. 650. 606. Gilb 108. Mod 701. Com 344.

A writ of Error is not amendable; for amendments are allowed to affirm Judgements, & not to destroy them. 5 Mod 16. 69. Salk 49. Carth 5. 70: 2 Bac 202-7-9.

In Eng a writ of Error does not abate by the death of the Deft, so scire facias lies against his Executor. But a writ of Error does abate by the death of the Plff. 2 Bac 207-9. 1 Ld 134. Salk 254 Gilb 210. Carth 230.

It is doubtful whether our Statute will receive such a construction as to warrant the adoption of the latter part of this rule. Stat 22. 3.

In Eng it Com a writ of Error is not a matter of Right in all cases. In Eng it is to be allowed by the Clerk of Errors before it is operative. 2 Bac 210. 2 H 681. Salk 264. 321. 1 Roll 492.

In ~~Eng~~ Com the Judge is to examine the record, & if he thinks that there is no possible ground of Error, he will not sign it. 2 Bac 277.

In this State error is not predicable of the proceedings on Petition for a new trial; it being a matter of direction with the Court to which it is preferred, to grant, or negative such petition. But if a new trial is granted in a case in which from its nature a new trial could not be legally granted, as in case of Murder, Felony &c it seems that Error might be predicated of the proceedings; not indeed on the ground that there was not sufficient reasons for it, but that it was illegal. Kirby 41.

Debt on Judgement may be sustained notwithstanding a writ of error on the Judgement; for tho' the Execution is superseded, the debt or duty remains, since an erroneous Judgement binds, till reversed by writ of error. 2 Bac 211. 1 Roll 735-40-2. 2 J 496. 8 Co 142a. 3 Com 177. 8. Ray 101. 1 Lid 236. 1 Lev 153. Shir 388.

But in some cases the Court will stay proceedings in the action of Debt, till a decision on the writ of Error. 2 Tr R 70.

If a third person however obligate himself to pay what shall be recovered in a suit, it is not stayed pending error. 2 H Blk 372.

When the Execution is completely executed, as by taking the Deft body, & imprisoning him, the writ of Error is no Supersedeas. Goods of property has been taken & sold. 4 Bac 670. 84. Fitz 1 R 251 in 231. 1 Vent 30.

If goods are to be taken, & not sold Judge H doubts whether the writ is a supersedeas, or not. the authorities being contradictory. 4 Bac 684. Gilb 6. 1 Vent 255. Salk 323. 2 Ray 990. Contra 2 Bac 210. 11. 4 Bac 684. —

It has been decided in Con that it is not a supersedeas. Cont 563.

On a Judgement of Affirmance the practice is to allow interest on the original Judgement, both in Eng & Con. But in Eng interest is not allowed against the last in error. 2 Tr R 57. 70. Bury 723

In Con the Court above may allow interest, or not, at their direction. Stat Con "Error".

According to our practice, an erroneous Judgement is a
to the original Debt, as a final Judgement, that is the original
Debt if not satisfied by the first Judgement, is not on the reversal
but in Dig et is otherwise it seems. Brook 557. 1 Shrift 175-6.
Cutler 1 Bac 212. 2 Ld. 94.

It is a general Rule that one cannot assign for error that
matter which might have pleaded in abatement. 5 Co 86.
2 Ld 297. 299. Earth 124.

Certain exceptions to this Rule have been considered and
the Division, Pleas in abatement.

If the Deft in error does not assign Errors, Judgement is not
affirmed. But the first Judgement remains good. The Deft in
Error therefore does not recover costs on the writ, but pursues
Debt on the bond. 2 Bac 210. 2 Rol 52. Lid 294.

If the Deft in Error is nonsuited, there is no Judgement of
affirmance, or reversal, but merely for the Deft to recover his costs,
in Connecticut.

A reversal of Judgement in some cases overreaches the
proceedings under the original execution. Thus if goods or lands
be taken & kept by the Officer, or delivered to the Creditor at a value
considered, & Judgement be afterwards reversed, the property
is restored to the original Deft. 2 Bac 231-2. 370: 1 Rolle 770.
2 Ld 246. 2 Com 177.

But if the property be sold by the Sheriff, on the Execution
to a Stranger, he will hold it notwithstanding the reversal of
Judgement, that is, when the Sheriff is required by law to sell.
2 Bac 231. 2: Yelv 108. 8 Co 143. Cro El 770. Mod 573. Cro Jac 246. 2 Leon 89.

It has been decided in Con that if the property be land, the
Stranger cannot hold it; & so it is believed the law stands in
Eng. — In the case above however, tho' the property is holden, the
party may have the money for which it was sold. 8 Co 143. Cro Jac 246.

The rule laid down by Coke is that collateral things executed,
are not divested by a reversal, collateral things executory are.
8 Co 142. a 86. 1 Leonard 38.

So if one in Execution on the original Judgement escape, &
before Judgement recovered against the Sheriff for the escape, the
original Judgement is reversed, the action for the escape is gone.
But if Judgement & Execution had been reversed; then the
Judgement would remain, notwithstanding the writ of error; for
then the collateral thing is executed. 8 Co 142. 1 Leon 38.

But in the last case the Deft might have been relieved by
an audire querela. Cro Jac 646. 2 Bac 231-2.

But if property is taken & delivered for a valuable consideration,
into the hands of the party, in whose favour the erroneous Judgement
was, & he sells it, after which Judgement is reversed. — Is the
property restored to the Deft in Error? 8 Co 143. Cro Jac 270. Yelv 108.
179. Brownlow 107. 8.

And if the Sheriff should sell the property, when he is not
required by law so to do, even to a Stranger it is restored on reversal;
as, in case of the goods of an outlaw, taken by capias ut lagatum when the Shff is not required
to sell them, but keep them for the King. 2 Bac 232: 1 Roll 770. 5 Co 90. Cro El 270. 3 Bac 770.

A writ of Error in Com is barred if not brought within three years from the day on which judgement was rendered below. Rob 54.

In Ky a writ of Error must be brought within twenty years from the signing or entering of the Judgement of record. 7 Bac 200. 5 Com 240. Stic 857.

When Judgement is for the Deft in error, he recovers his costs, on the suit in Error; if for the Pltff in error, no costs are taxed on the suit in error. But if in this case the judgement in error puts a period to the controversy, as it will in general, if the Deft below is Pltff in error, & prevails, he recovers costs on the original ~~suit~~ suit. If judgement below is against the Deft below, in a verdict which found an immaterial issue against him, & he brings writ of error, & prevails, this does not put a period to the cause. If the judgement in Error, that is, where for the Pltff in error, does not put a period to the controversy, (as it will not if the Pltff below is, Pltff in error, & prevails) he enters for trial, or has the cause remanded, & if he finally prevails, he will recover all his cost except on the suit in error.

If the Pltff in error has paid any thing on the erroneous judgement, he recovers the sum as damages on the reversal. If nothing has been paid no damages are recovered.

But on reversal the Pltff in error recovers cost, which he ought to have recovered below, unless he runs a further trial. If he has, the whole of his cost must await final Judgement.

Under our Statute interest on the original Judgement is allowed, on judgement of affirmance, at the discretion of the Court. So also on nonsuit, or retraxit. It is allowed however I believe, according to practice, in all cases. 8 Com 162

In Common Cases the allowance of interest is discretionary in Eng. 2 W Blk 204.

It is not allowed however in debt on recognizance against bail in error. 2 Ve 57.

Cases exemplifying the effect of an affirmance or reversal of Judgement on writ of Error.

A vs B) In the Court below.

Case 1st Judgement below for A, to recover of B. £20, debt & £10 cost. Judgement is reversed before A has collected any part of his execution, Judgement above is, that the Judgement below be reversed, & that B recover of A £40. the amount of the costs incurred by B. in the Court below. But no costs are recovered by B on the suit in Error.

2 — The case as before except that A has collected the contents of his Execution or £20. debt & £10 Cost. Judgement of reversal as before, & that B recover £40. on the £30. paid to A. on the erroneous Judgement, & £10 Costs, which B ought to have recovered in the Court below.

3 Judgement below in favour of A as before, affirmed in the Court above. Here the Judgement above is, that the Judgement below be affirmed; & that A the Deft in error, recover his costs on the suit in Error. the Judgement below is again operative. Interest on the first Judgement is allowed, if the

the Court in their discretion think proper, & execution issues for it. The practice is, I believe, to allow it of course. See Cro. 162.

4. The Judgment below was in favour of B. the Deft below, & by writ of error reverses that Judgment. The Judgment in this Court is merely a judgment of reversal. If the Court above is competent to try questions of fact (as B K in Eng. & the Superior Court in Con.) A on the Judgment of reversal enters the cause in the Court above for trial; & on final judgment, if he prevails, recovers together with his debt, or damage, all his costs which accrued before the Judt. of reversal, as well as those which have accrued since. But he recovers in costs on the suit in error. If a had paid the costs taxed against him, on the Judgment below, he would have recovered that on the Judgment in error as damages.

5. The Court which reversed the Judgment in the Cro. case, was not competent to try the question of fact (as the Exchequer Chamber in Eng, & Supreme Court of Errors in Con). The cause is remanded to the Court below; & the Deft in the original action pleads as he pleases, except that he cannot plead the same defence on which he originally rested; For if he does, he pleds of course, the Judgment in error being defective against him as to that defence. Baron vs Buttrick S. C. 1798.

6. Demurrer, in the Court below, to the declaration. The declaration was adjudged insufficient. On writ of error the Judgment is reversed. Then it would be absurd for A to enter, since his declaration is adjudged insufficient. And the Deft below never wishes to enter for trial.

7. The declaration in the Court below was adjudged insufficient — reversed on a writ of error. Then A enters for trial, if the Court above can try questions of fact; for he has a good declaration, & the merits have not been tried; since the Court above has rendered only a Judgment of reversal, not a Judgment for A to recover. And the Court above cannot on the Judgment of reversal, ascertain damages.

8. Plea in bar demurred to below, & adjudged sufficient. Judgment reversed. A enters for trial; for as yet there is no Judgment for A to recover, & on the face of the record he has a right of recovery.

9. Plea in bar adjudged insufficient below. Judgment reversed. If A should enter it would be to no purpose. B does not wish to enter; for his object is to depend, & there has been no Jud. against him.

10. Plea in abatement. Judgment below for the writ abated. Judgment reversed above. The Pltff enters for trial, for he has a good writ.

11. Plea in abatement as in the last case. Judgment of respondeas ouster in the Court below reversed in error. A cannot enter; for he has no writ.

12. If error is brought for the admission, or rejection of evidence the Pltff below may enter for trial on reversal, whether he is the error Pltff or Deft; & whether the judgment of reversal is for or against him.

If B's witness was excluded below — on a bill of exceptions, the judgement is reversed. & enters for trial. Then he is Plff in error, & the judgement in error is in his favour

B's witness was excluded below — Judgement reversed. Then B is Plff in error, & the judgement of reversal is in his favour. Yet he may enter for trial, if he pleases; for he may possibly prevail, notwithstanding the admission of B's witness.

Note. In all the above cases in which the original Plff is supposed to enter for trial, on a reversal of Judgement the Court above is supposed competent to the questions of fact. If this be not the case, the record is remanded to the Court below, & then the final trial is had. see 4 & 5. cases above.

When the judgement in error puts an end to the litigation between the parties, the action is never entered in the Court above, nor remanded for trial. The litigation is always ended, when the judgement is affirmed; but it is otherwise on a reversal of Judgement, unless the judgement of reversal is against the original Plff. And even in this case, that is, when the judgement of reversal is against the original Plff, if the judgement above is founded on the illegal admission, or rejection of evidence, the litigation is not of course ended, & the original Plff may still enter for trial, if he pleases.

Of New Trials.

The practice in Eng & Con. with respect to new trials, is considerable different. The principles are much the same.

New trials are granted for causes wholly extrinsic, both in Eng & Con. 3 Blk 387.

In Eng new trials are obtained by motion, on which a rule to show cause is made. In Con according to practice by petition. Bull 327.

In Eng the motion must be made within the first four days of the succeeding term, if the trial was in vacation at Nisi Prius; if tried in term, within four days ~~of the~~ after the day of trial. For in Eng the motion is to be made before judgement entered up. 3 Blk 392. 5 Bac 241. See 995. 1 Burr 318.

A motion is not sustainable after the day on which judgement might have been signed, unlesp the matter upon which the motion is founded was not discovered until such day had passed 5 Bac 241.

The motion for a new trial in Eng if sustained by granting a rule to show cause, suspends the judgement, that is, prevents it from being entered up — & the reasons are afterwards discussed in bank.

In Con it seems from the decision in one case that a new trial may be granted on motion. Kirby 163.

The time is limited in Con within which an application for a new trial must be made — it would probably not be granted after a great length of time.

The petition states the ground of application, & the opposite party may demur to, or deny them. The petition is no stay to the proceedings.

Both in Eng & Con an application for a new trial is, according to the general rule, an appeal to the discretion of the Court.

Therefore generally it is not granted, when ~~the~~ justice has been done, at least not without strong probable grounds, that the merits of the cause have not been fully discussed. 2 Will 304.7. Bull NP 326. 1 Mod 2. 3 Blk 391. 2. Salk 644. 648. 1 Burr 399. 2 Ter R 4.5. 116. 646. 4 Ib 469.

This rule does not apply in all cases. (post)

Hence the Court can impose terms on granting it, as the discovery of certain facts under oath — the admission of facts not intended to be litigated — the production of books, papers &c & in Eng the examination of witnesses in form, or going abroad. 3 Blk 392. Salk 648.

In Eng if the ground of the application is any thing which passed at the trial the information on which the Court acted, is taken from the Judges report. If it did not appear at the trial, it is disclosed by affidavit. 3 Blk 391. 1 Sid 255. 2 Lev 140.

Law is not predicable of the decisions of Courts in granting or refusing new trials, it being a matter altogether discretionary. Kirby 41. In Con new trials cannot be granted by a single minister of the law, but only by the Superior & County Courts. Kirby 9. 170.

As to the antiquity of New Trials the books are at variance. Blackstone places them in the reign of Ed 3d others to the time of Cromwell (1655) 3 Ter. 131. Stra 101. 995. 3 Blk 387. 7. 8. 1 Burr 394. Salk 648. 1 Ld Ray 213. 5 Bac 240. Stiles 462.

The cases of Ed 3d were for trifle damages, as affording a presumption of misbehaviour. But since those times new trials are granted for many more causes than those. 1 Burr 396. 5.

New Trials in Eng, are of late years, granted after trials at bar, as well as at Nisi Prius, when they were granted at all. 1 Burr 395. ~~Stra 101.~~ 585. 1105. 5 Bac 243. 5 Ba 1360.

It was formerly held that no new trial should be granted in these cases, except for misbehaviour of the Jury. 5 Bac 243. 1 Sid 58. Salk 648. 7 Mod 37.

And the general maxim is, that in all cases of substantial importance, a new trial is to be granted; if it can be made to appear that injustice has been done at the first trial. 3 Blk 388. 392. 1 Burr 395. Lucas 202. 6 Ter 630.

When the case is of small consequence, a new trial is not generally granted. 3 Blk 388. 392. 1 Burr 395. 665. 4 Burr 2093. 4 Ter 790. 5 Bac 246. Pl 60.

It is a general rule ~~that~~ in Eng, that a motion ~~in~~ for a new trial cannot be made after a motion in arrest of Judgment, unless when the cause for a new trial was unknown at the time of moving in arrest. Salk 647. 5 Bac 241. Bull 326. 6.

It is holden, that when there are several Defts, & all are convicted, or there convicted and part acquitted, no new trial would

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(1) There never yet has been a case in which the party has been permitted after trial to avail himself of any objection, which was not made at the time of the examination. 17 Ir 719.

be granted, as to one, as a part; for the verdict must stand or fall in toto. Bac 326. 3 Mk 362. 10 Mod 275. Str 607. Stra 814.

Our Superior Courts have collaterally given an opinion against this rule, & it seems now overturned in Eng. 6 Ter 630.

Cases for granting New Trials.

1.st Want of due notice to the Deft. 5 Bac 241. Salk 646. Bull 327

This however is no cause if the Deft has appeared & defended; for this cures the defect of notice. Salk 646. 428. 435. 5 Bac 241.

Consent of parties can remove all other objections to Jurisdiction, than those which relate to the subject matter.

In the case of want of notice, the Court I presume are not left to their discretion so far as to refuse a new trial because Justice has been done; for there has been no trial, & the Deft has an unqualified right to be heard.

2.d For a defect or mistake of the Judge, before whom the trial was, as when the Judge was interested, or when he admitted improper, or excluded proper evidence; the first example is one of a defect, the latter of a mistake of the Judge. 5 Bac 244. 544. 10 Mod 119. 5 Bac 242. 7 Ks 5.

So for misdirecting the Judge in point of Law. Bull 327 & Ter Kr 753.

In some cases New Trials have been granted in Eng for misconduct, or admission of improper evidence by the whole Court — But this is not common.

The ground of misconduct cannot exist in Con, for here the Court do not direct the Jury at all either as to the Law or fact. But the improper admission or exclusion of testimony may take place as in Eng. Then it is always admitted by the whole Court, & therefore new trials are often granted on this account, tho sometimes they are. A Bill of Exceptions is a proper & the most usual remedy in Con.

Tho the admission of improper evidence is a good cause for new trial; yet the incompetency of a witness not ~~admitted~~ objected to at the trial is not a substantial ground for a new trial; it may turn its weight among other things. 1 Ter 71. (1)

But our superior Court have granted a new trial on this sole ground, tho' the evidence was not objected to at the trial. Palmerlee vs Lamber 1796.

3. For defects or incompetency in the Jury in certain cases. This if a Juror might have been challenged as incompetent, but the fact was unknown at the trial, & consequently could not be taken advantage of, a new trial will be granted. 5 Bac 245. Jac. 254. 1 Dut 30. Stile 329.

But will a new trial be granted in any case, unless the cause of challenge goes to the impartiality of the Juror.

In the case in Vent 30. a new Trial was refused on the ground of laches. It does not appear but that the Deft knew of the cause of challenge at the trial. In Stile, 179, the parts must have knowledge of the cause.

In Con Motions in Arrest of Judgement are concurrent with new Trials in the last cases.

2 Misconduct of the Jury, as corrupt practices, partiality, inattention &c. Thus if the Jury upon the decision to adjourn, a new Trial will be granted. 5 Bac 250. Burnb 51: 2 Lev 146. Sra 642: 5 Bac 288. 91: 2 Jones 83.

So for the misconduct of an Juror; as when the foreman had declared that the Plff should never have a verdict, whatever evidence might be adduced. 5 Bac 250. Salk 645.

In very early times perfect unanimity in the Jury was not necessary; but for a long time past it has been necessary. 5 Bac 287. 3 Blk 375. 6.

So in Com perfect unanimity is necessary. In Eng if they do not agree during the session, they are to be carted, & the Judge will not receive the papers till they do agree. 5 Bac 287.

In Con the papers will be received at the end of the session, but not before.

But both in Eng & Con if the Jury are not unanimous in their verdict; it is in strict nisi bad, & must be set aside. The verdict of eleven has been set aside in Eng. 2 Bac 287

But an expedient has been adopted both in Eng & Con to evade the rigour of this law. This is done by permitting the minority to come in silent, that is, without directly assenting or objecting; & the dissenters are not allowed to testify their dissent. 5 Bac 251. 291. Sty 100. Comb 14. Ribby 416. 2 Str 263.

In Eng after the Juror are locked up it is misbehavior in them to eat or drink, till they have agreed in a verdict, & returned it to the Judge. 5 Bac 290: 3 Blk 375. 2 Mod 33. 1 Vent 125.

But the verdict is good notwithstanding, tho the jurors are liable to be fined. Co Lit 227. Dyer 210. 12 Mod 111. 1 Lev 132. 2 Ray 148.

If the Jurors eat, or drink at the expence of one of the parties before they have delivered up their verdict, it is fatally bad, & there must be a new Trial. 5 Bac 290. 1 Vent 125. Co Lit 227. 12 Mod 111.

For the purpose of relieving the Jury from the hardship & abstinence, till the verdict is delivered in Court, privy verdicts have been devised in England, that is, verdicts delivered to the Judges out of Court. 5 Bac 202. Co Lit 228. 2 Mod 33. Plow 211. Dyer 217. 3 Blk 377.

But a privy verdict is not binding on a Jury — they may vary from it, in the verdict given in open Court. 5 Bac 202. Co Lit 227.

The Jury's eating & drinking, at the expence of one of the parties, after having rendered upon a Privy verdict, does not vitiate another, provided it is not charged for the party treating. 1 Vent. 125.

Privy verdict cannot be given in the case of felony, nor in any case of life, a member; nor when the personal appearance of a member is necessary to his conviction. 5 Bac 203. Ray 193. Vent 97. Co Lit 227. 2 Hale 657. 647.

Privy verdict are not adopted in Con since we have not adopted the practice which gave rise to them.

It is said to bampton, that the Jury have a right to find their verdict partly from their personal knowledge. But this seems not to be law. The rule seems to be that a Juror has no right to communicate his knowledge to his fellows after they have retired. He should tell it in open Court; otherwise the verdict is bad; for each party has a right to cross examine. So for the rule is infavorable from the granting of a new Trial; because the verdict is contrary to evidence. (post). Ray 147. Contra 3 Blk 374-5. 5 Bac 209. 1 Lev 183. The Jury have no right to examine a witness in private, after retiring. If they do, the verdict is bad, & a new trial will be granted. 5 Bac 288. Co Ll 109. 411.

In Eng the Jury cannot take out with them any written evidence, tho exhibited at the trial, without the consent of the parties. We have no such rule here.

In Eng if the Jury do take written evidence, which has been given in evidence, without consent of parties or consent of the Court, it is a high misdemeanor. But if the writing furnished evidence on both sides, the verdict is good, otherwise not. Co Lit 227. 5 Bac 280. 2 Rolle 714. 2 Ray 128. Co Ll 411: 12 Mod 250.

The latter rule is not so strong as that relating to parole evidence received by the Jury (not sworn) for parole evidence may vary.

If the Jury take with them any written evidence not exhibited at the trial, the verdict is bad, & a new trial will be granted. 5 Bac 289. 1 Lev 235.

And tho the Jury's misconduct vitiates the verdict; yet they are not admitted to testify to the fact; the evidence must be derived aliunde. In contrary rule it seems was formerly holden. 1 Ze 11. Vern 430. 41. Contra 5 Bac 288. Co Ll 109.

In Con when the Jury have misconducted as above, motions in arrest of Judgment are concurrent with new trials.

5 The Jury's finding a general verdict, when directed by the court to find a special one. This is not illegal, for the Jury are not obliged to find specially.

This direction is generally founded on the application of one party or both. And if the verdict is against the opinion of the Court a new trial is granted. 5 Bac 281. 1 Ld Ll 213.

In the 7 Mod 37. a new Trial is sent a Case, or as expressed, but it was refused because it was after trial at Nisi in which Case new Trials formerly were not allowed. easily obtained.

6 The verdict being contrary to evidence, is a good cause for a new Trial. 5 Bac 246-7. 290. Stra 1105. Wall NP 326-7.

This rule holds in Eq as well as in Law, notwithstanding the contrary is asserted by Mr Swift. 2 Swift 272.

New Trials are not granted if the scales of evidence seem nearly equal. The evidence against the verdict must strongly preponderate. 3 Blk 392.

But it has been said, that in this Case there must be either no evidence in support of the verdict, or so little as to amount to nothing. Stra 1106. 1142.

This however seems not now to be the rule. And it is said, that the Court ought to grant a new Trial, if in the opinion of the Judges the verdict is clearly against the weight of evidence. Wal NP 327. 5 Bac 247. 1 Burrs 322.

7. If the Jury have given a verdict on a misconception of a Point of Law, or generally against Law, a new Trial will be granted. Stra 425. Salk 646. Comb 402. 2 Will 307. 4 Ter 470. 2 Str 147. There are not many Cases of this kind.

No new Trial has been granted for the cause in Com. Ched in Eq, it is not granted, when the Case is a hard one; or other Justice has been done. 2 Ter 5.

So if in Point of Law, the Pltff was entitled to nominal Damages only, & the verdict is for the Deft; a new Trial will not be granted; for the Case is too small, & besides Justice has been done. 5 Bac 246-7. 2 Burr 2093. 6 Ter 750.

8. Smallness of damages is a cause for a new Trial. But this ground is good it seems, only in actions on Contract, as on promissory Notes &c. There is no Case in Torts in which this cause has prevailed. 5 Bac 140. 2 Co 21. Stra 940. 1051. 1 Burr. 532. 2 Str 366. 4 Ter 655. Wall NP 327.

It is said that then the reason why a new Trial should not be granted for smallness of damages in Cases of Tort. 2 Burr 354. Mylne 2.

The rule of not granting new Trials for smallness of damages does not hold when the Jury have made the damages small through mistake in point of law; nor when the Pltff is deprived of Just Damages by any surprise. Salk 647. Stra 425.

9. Excessiveness of damages is a good cause for a new Trial, in Cases both of Contracts & Torts. The contrary however was formerly held in Cases of Torts. Wal NP 227. Cont 17. Sikes 462. 5 Bac 249. (1)

New Trials have been granted because the damages were excessive, & the Jury appeared partial. 1 Ter 277. 6 Str 657. 8 Str 207. Salk 649. 2 Will 465. 2 Str 1244. 3 Str 62. Bur 609. 1946. Stra 691. 2.

From the current of Cases, the presumption of partiality seems not necessary, tho some Cases of the modern Cases look that way. 5 Com 155. —

an right of action, that the original owner had, may consequently sue in his own name.

Promissory notes are now in fact on the same footing. 5. The consideration of negotiable notes cannot be inquired into after they are indorsed in the Mer. Law.

In the Com. Law they may.

6. In Mer. Law the act of one partner in trade, in the name of both, is the act of both. [2]

But this is not the Case with any of the joint Tenancies at Com. Law.

It has however been made a question, whether the acceptance of a bill upon a private transaction, in the name of the company, would be binding upon both? Judge Thomas thinks it would, unless the ~~[illegible]~~ holder of the bill knew at the time of

(1) The law merchant is in the books called the custom of merchants; but it is not properly a custom because it is not the custom of any particular place solely, but it is a general law operating upon certain subjects as a general law.

The law merchant is a branch of the Common Law confined to certain particular transactions.

The rules of the Com Law must ex officio be noticed by the Court, unless the custom of a particular place varies from the general law of merchants.

This mercantile law obtains in all countries having commercial concerns, & is in general the same in all of them. If the custom of one country varies from the general law, & is tried in another, the custom must be proved.

(2) It must however be an act concerning the partnership. —

not be granted for smallness of damages in case.

The rule of not granting new Trials for smallness of damages when the Jury have made the damages small in point of law; nor when the Plff is deprived of their damages any purposes. Salk 647. Stra 425.

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From the current of cases, the presumption of partiality seems not necessary, the tone of the modern cases look that way. 5 Com 155. —

Mercantile Law.

(1) The Law upon this head is not confined to any one Country, but is common to all the commercial world.

The Subjects of this law are Bills of Exchange, Negotiable Notes, Policies of Insurance, what commons navigation in general, & factorage.

Notes in most countries are made negotiable by Statute.

Variations in the Mercantile law from the Common Law.

This differs from the Common law in many respects.

1. It is a rule of the Com Law that no Contract is binding, without a consideration.

In the Law Merchant there may be & are many contracts which are binding without any consideration.

2. At common Law no act that a Country will bind another so as to render him liable to an action.

But in the Law Merchant there are many cases in which a man may sustain an Action for a voluntary Courtesy.

An acceptance of a foreign bill of Exchange for the honour of the drawer is an instance to prove this.

3. Fraud in the consideration of a contract does not vitiate it, at Com Law, ~~provided it is total~~.

But in the Mercantile law the shadow of fraud in the consideration, as well as in the execution, will vitiate the contract. Even a suppression of any truth, which the vendor is in possession of, which if known would probably alter the contract, will be considered fraudulent, & will vitiate the contract.

In Com fraud in the consideration, vitiates the contract at Com Law, provided it is total.

4. At Com Law it is impossible to assign a chose in action, so that another can have the benefit of an Action in his own name.

By the Mercantile law an assignment vests in the assignee, the same right of action, that the original owner had, and he may consequently sue in his own name.

Promissory notes are now in by Act the same footing.

5. The consideration of negotiable notes cannot be inquired into after they are endorsed in the Mer Law.

In the Com Law they may.

6. In Mer Law the act of one partner in trade, in the name of both, is the act of both. (2)

But this is not the Case with any of the joint Tenancies at Com Law.

It has however been made a question, whether the acceptance of a bill upon a private transaction, in the name of the company, would be binding upon both? Judge thinks it would, unless the ~~[illegible]~~ holder of the bill knew at the time of

[illegible] that it was upon a private transaction.

7. At Com Law the Jus Accresendi universally prevails in Joint Tenancies.

But at Mercantile Law there is no right that accrues in Commercial partnerships, upon the death of either of the partners.

8 When the Com Law speaks of months, they calculate Lunar months.

But in the Mercantile law calendar months are calculated.

9 There has been much said with regard to the calculation, when an instrument says "from the date" & "from the day" of the date. In the Mercantile law the day is always excluded in both cases. In the Com Law ~~[illegible]~~ it remains still undecided; there being many contradictory authorities. Lord Mansfield has given it as his opinion that there is no difference, that in both cases the day of the date should be excluded.
See 829. Doe 2 Bla 1202: Comp 714.

10. At Com Law the release of one Joint obligor after conjunment is a discharge of the others. At Mer Law you may release & retake at pleasure [illegible] opening of a [illegible] 2 P.W. ~~[illegible]~~. 1238.

Bills of Exchange

A Bill of Exchange is an open letter from one person to another, ordering him to pay a third person, or his order, or the bearer money.

The man who draws the Bill is called the Drawer. The one on whom it is drawn the Drawee. And the person in whose favour it is drawn is called the payee.

The mode of endorsing is for the payee to ~~[illegible]~~ write his name on the back. When it is payable to the bearer, there is no need of an endorsement, it passes that is the right to receive the money passes with the bill. But when payable to order no one but the endorsee is entitled to receive the money for it.

Days of grace means three days after the time mentioned for payment. When a bill is payable at sight no days of grace are allowed.

The law upon Bills of Exchange attaches to all Bills, wherever be the propriety of the Drawer. Co Lt 306: 2 Brut 295.

The presumption of law is that the drawer owes the payee.

The holder may, in case of refusal of payment by the drawee, go either upon the Drawer or any previous endorser.

Foreign Bills are those which are drawn upon foreign Countries. Inland are those which are confined to the Country in which they are drawn. The Law Merchant was only applicable to foreign bills, but by Stat inland are put upon the same footing.

(1) The rules following are upon Promissory Notes.

With one or two exceptions the law upon bills of exchange is applicable to negotiable notes.

The law merchant does not operate upon ~~bills of exchange~~ negotiable notes till they have been transferred.

(2) A Bill payable to such an one or bearer; & bearer are upon the same footing.

All persons who are able to contract are liable for their Bills of Exchange.

It has been made a question whether minors are bound by their Bills of Exchange for necessaries.

Minors are bound by their notes for necessaries, but not by bonds for the consideration of a note [illegible] to inquired into, but that of a bond cannot. The principle which governs in this case is to preserve them from imposition. — The considerations as of Bill of Exchange may be inquired into, as of a negotiable note, as long as it continues in the hand of the payee [illegible] reconcilable to principle that it should be binding as between them, but not when it passed into other hands. 1 Doug 90. If the payee endorses the bill he is liable.

~~Bills & notes~~ may be [illegible] & accepted by an agent, & the principle will be bound. The agent is in no [illegible] answerable for them Gow 75. 3 Bos & P 30. Dorrs Ser Rep 462

The requisites to constitute an agent has undergone a revolution. It was once held, that to constitute an agent for drawing & accepting bills, a written power of Attorney was necessary. It has since been determined that it is not necessary to prove a power, provided the principal has accepted the agents bills, this furnishing a presumption that he was empowered. But it is altered from this now; it may be recalled. — Now any apparent power, parol or written is sufficient to constitute an agent, ~~&~~ long as the agent continues in the principles service. 7 Term 20 Cy.

(1) The law which applies to the drawer of a bill is applicable to the endorser of a note.

The law which is applicable to the acceptor of a bill, is applicable to the drawer of a note.

That which is applicable to the payee of a bill is applicable to the endorsee of a note.

As to the supposed difference between a bill payable to "A or order" or "the order of A". See 10 Mod 286. 2 Show 8.

It has been held that the law Merchant is not applicable to negotiable notes; but it is now decided otherwise. 1 B & Ald 288. 3 Burr 1516. (2)

If a Bill is payable to "A or order" no other person can [illegible] any right in it without A's endorsement.

No persons, by the law Merchant, can be sued upon a bill or note, excepting the drawer, & endorser & acceptor. But if a man has passed a bill without endorsing it, & the acceptor & ~~endor~~ drawer refused to pay it, the one who passed it can be sued at Com Law for money had & received, without a consideration.

When a bill is payable to the payee or bearer, no person is liable except the acceptor & drawer.

The consideration of these contracts cannot be ~~[illegible]~~ inquired into after they have passed from the payee. 1 Blk 445. 3 Burr 1639. (2)

At Com. Law it was considered a crime to assign a chose in action, it consequently did not recognise the idea that the owner could sue in the payee's name. A man who sued & recovered upon an assigned chose in action, in another name was liable to a fine. 1 Strange 26. 619.
But by the mercantile law the holder may sue in his own name.

Requisits of a Bill.

A bill of Exchange or a note to be negotiable, must have certain requisits.

1st It must be a bill for the payment of money. 2 Strange 1191.

2d It must rest upon the personal credit of the drawer, & not upon a particular fund. A Bill, for instance, to pay money out of a growing subsistence is not negotiable. 3 Will 218. 10 Mod 294. 316. 3 Will 207. 2 Blk 782.
With respect to notes it is not so, there the maker is liable at all events. ~~10 Mod~~ 5 Ra 1545.

3 It must be payable at all events. 1 Burr 325. 5 Ra 1563.

These go upon the principle of want of certainty. 8 Mod 363. 2 Stra 1151. 1217. 1 Burr 227. (1)

There is one case which looks like an ~~exception~~ exception to the last requisit. A Bill to be paid when the Kings Ships are paid off, is good. This however in construction of law is certain, for they will not recognise the principle that it is uncertain whether the king pays his debts. 1 Stra 24. 1 Blk 262.

There has been much litigation whether value received was necessary in bills, or notes. It has now decided that it is not. 8 Mod 267. 1 Show 5. 5 Hardwick 25.

It has likewise been made a question whether words "or order" are necessary to the negotiability of a bill or note. Holt Rears Rennes of no case to the point. He is of opinion that it is necessary to its negotiability. —
If the payee makes an endorsement payable to another or order; he thinks that endorsement will be sufficient to bind him to the endorsee, but does not subject the drawer.

(1) A promise however to pay if ~~the~~ A does not is no bill of Exchange tho' the event is sufficiently certain. 8 Mod 363. 2 Str 1151.

If the event must happen, as to pay so much in 15 days after A's Death, it is a good bill. 2 Str 1217.

A Bill to pay when A is of age is a good bill & should he die before he becomes of age, it must be paid when he would have been of age. 1 Ven 227.

(2) When a broker pays money on account of illegal Stock jobbing transactions for his principal, & the principal pays him the money so advanced, by a Bill of Exchange, an indorsee who knows the consideration of the bill cannot recover on it. Stevens vs Lesley 1 Esp 166.

(1) The acceptance contains a covenant that he will pay the bill according to the tenour of it; not to the payee only, but to the order.

(2) If the drawee writes to another "Please to pay the contents of the enclosed" it is an acceptance.
Bull N P 270.

J Barrow 1674.

Of Acceptances

These may be either written or verbal. They are both equally binding.

The Amount of an Acceptance is, that a man will pay it according to the tenor. 1 Stra 648. 8 Ann 1674.

It has been made a question whether a verbal acceptance was not within the Stat of frauds & perjuries, being a promise to pay the debt of another. The law goes upon the presumption that the drawee is a debtor; it is therefore only a promise to pay his own debt. —

It is not necessary that the acceptance be written on the bill. 1 Stra 648. 8 Ann 1663. 1 Ld Ra 715. Str 127. 1 Ld Ra 536. (1)

It has been often offered that a man may accept out of courtesy, for the honour of the friend. This acceptance must be restricted to cases when the drawee is absent; or is of bad or doubtful credit, or refuses to accept. Bowes 456. 458.

A mere promise, which would be nudum pactum at Com Law, will often be binding in Mer Law. If a promise induces another to trust, the promisor is bound by it, altho there is no consideration. As, for instance, if A promises to accept bills, & B is thereby induced to purchase them, A cannot recede from his promise. 3 Ann 1663. Bowes 454. Comp 372. 374. 1 Str 715. Doug. 1 Bason vs Hunt.

A bill may be accepted to be paid at some future day different from the tenor. Stra 214.

At Com Law, the least tampering with a bill vitiated it. At Mer Law it does not vitiate it, but it leaves the offender to be punished by prosecution. Bowes 48. or 481.

Bills may also be accepted payable at another place. Also for a less sum. Also payable in something else than money. An acceptance may also be conditional; as to pay it in case an consignment arrives. Stra 1165. 1351. 2 Will 9.

If an acceptance is in writing the condition must be in writing. Comp 571.

The payee or holder of the bill, is not obliged to accept of any acceptance different from the tenor; and notwithstanding any of these acceptances, even tho he agrees to accept them, he may protest.

Any thing written on a bill, which does not amount to a refusal to accept, is an acceptance. "Acceptance" & "Seen" written on a bill have been decided to be an acceptance.

It is not necessary that a man sign his acceptance (2) Bill 492

Transfers

Many rules which should regularly be placed under this head have been already mentioned.

Bills payable to bearer pass without endorsement. Those payable to the payee or order must be endorsed to be negotiable.

When endorsements are filled up, as an endorsement to pay to some particular person, they must be indorsed to be negotiable. Blanks endorsement will pass without any further endorsements. Doug 617. first edition. 639. second. 4 Bos. & Pul 633.2?

Indorsements may be made on blank notes. Doug 296. 1st B. 514. 2?

When a man transfers by delivery, he is not by the law merchant answerable, in case of non payment. But the money may be recovered at Com Law, as money paid without any consideration.

A transferee may recover from the transferer upon promise, without endeavouring to recover it from the acceptor. 2 Str 412. Salk 123.

A man may empower another to receive the money; when the endorsement appears as a power of Attorney for this purpose, its negotiability is ended. 1 Show 163. 2 Str 871.

The endorsee holds with all the privileges of the payee. 2 Str 1276. 4 1216. Com 311.

If a payee assigns for a valuable consideration, he cannot by any endorsement, restrict it from being further negotiated; & also cannot exonerate himself from liability.

But an endorsement, which shows no consideration: or in other words a bills negotiability may be restrained before it is sold.
2 Str 1227. Doug. 616 & 639.

When a bill is transferable by delivery if it is lost or stolen, & afterwards comes into the hands of a bona fide purchaser it cannot be recovered from him. 1 Str 452.
This holds true Banks bills, as well as bills of Exchange.
These bills are considered in law as money, and policy demand that money should be free from any circumstance of suspicion. 3 Str 1516. Doug Peacock vs Rhodes.

No endorsement but the payee can make a bill negotiable. Such other endorsements however bind the indorser. —
But when the property of the Bill is transferred by law, the transferees endorsement will render it negotiable. As wants the assignees of a bankrupt. The Executor of a deceased. The Husband of a woman who was single at the time of receiving the bill. Str 516. 3 Will 1.

When a bill was payable to one for the use of another, the endorsement by the one entitled to the equitable [illegible] est, not necessary to render it negotiable. Carth 5. 2 Show 509.

An endorsement of a part of a bill will be allowed in law. If for instance a bill is for 50 £. an endorsement of 20 £ will not be enforced. This is to prevent the Drawee, or acceptor from being harassed with more actions than one. Carth 406.

Of the legal engagements of the parties to a bill.

The engagements of the drawer implied in law are that he will answer to the payee, or indorsee, the amount of the bill, with interest & damages, provided 1st. The drawer is not capable of contracting or binding himself. 2. Or if he is not to be found at the place mentioned. 3. Or if it is not accepted when presented & according to the tenor of it. 4. Or if it is not paid when it becomes due. Lev 469.

To these obligations is an implied condition that the payee does his duty.

It is the duty of the payee to notify the drawer of any default in any of these requisits.

It has been made a question, whether the payee's right of action commenced ~~immediately~~ immediately after a refusal ~~upon~~ to accept, or not till the bill became due? It is now settled that the right accrues upon a refusal to accept. This decision went upon the principle that a right of action accrues immediately upon a breach of contract. Doug. Mifford vs Mayer.

All indorsers are considered as entering into the same contract that the indorser does. 2 Blac 674. 1 Str 133.

A Judgment, without payment, is no bar to an action against any ~~one~~ of the other persons who are severally for the payment of a bill. 3 Mod 86. Show 441. 464.

The Drawer & every person to whom the bill of a bill would look for payment must be notified of its dishonour; otherwise they are released

If a bill is payable at a certain time after date, it is not necessary to present it for acceptance; but it is necessary to do so. Such a bill may be presented for acceptance at any time before the expiration of the day of payment; after which time it will have

Days of grace to run in. 3 Burr 1671. 1 Burr 713.

Notice of dishonour is required that the drawer may have an opportunity to look after the demands which he has upon the drawee. If the holder does not give notice within a reasonable time, & the drawer fails, the drawer is exonerated from the demand. 3 Burr 1671 = 3 Burr 1670 and 1 Burr 712.

When an acceptance varies from the tenor of a bill notice is as necessary as if the bill was refused. If it is accepted & paid partially, notice must also be given.

By three days of grace is meant the third day after the bill becomes payable; not three times twenty four hours. 2 Str 745. Str 819. 1 Burr 461.

If the third day of grace falls on Sunday, payment must be made on saturday. So on the day preceding a great Holyday.

There is no decision in the books that goes to show that notes are entitled to days of grace. But it is the uniform practice to extend it to them.

Notice must be given of non payment, as well as of non acceptance. And also if the Drawee has absconded.

In the notice it is signified that he looks to the Drawer, or endorser for payment.

This notice must be given by the holder of the bill.

When there are posts, notice must be given by the one next following the dishonour. If there is no post that goes to the town in which the drawer lives, the letter must be sent to the nearest post town. 1 Burr 109.

When the drawer is in the neighbourhood of the Drawee, no specific time is mentioned for notice to be given in; the rule is that it must be given as soon as possible. 1 Burr 167.

If the Drawee has no effects of the drawer, notice is not necessary; nor the reason for a notice ceases. 1 Burr 410. But even in this case the endorser must be noticed; the reason still holds as to him. 1 Burr 674

In foreign bills, the form of notice must be a protest; if notice is not given of protest, the notice is of no validity. It is usual to protest notes, but this is not necessary.

If the endorser knew that the drawer was a bankrupt, the endorser need not give the endorser notice of the refusal, on the post. 2 Str Blk 826. Esp N P Cases 302.

It is the business of notary publics to protest.

The holder informs him that he has a bill which was refused acceptance. The notary then demands of the drawer the payment, then if it is refused the Notary goes on to make a formal protest. Copies of it are sent to all whom one wants to look to. This protest is conclusive evidence in all cases. 1 Bul N P 270.

~~Not Hyp~~

(1) In a late case it has been questioned whether this time is allowed when the post goes within it.

The Drawee is allowed three or four hours to look into his accounts, & to determine whether he will accept or not. B N p 271. Bull N P 271. (1)

When it becomes due, it must be presented for payment altho it has been refused acceptance, and a protest must be made for non payment, as well as for non acceptance. Bowes 456.

The same method must be pursued as to protests, when the payee has absconded. And in the same manner for not accepting according to the terms.

Damages at Com Law means the interest of Debt & Costs. At Mercantile Law it means the Debt, interest, costs, & damages for disappointment.

There are many different rules of allowance for these damages. They depend upon usage. In Newport. Hale & Charleston 2 p cent is allowed. In Boston only 1 p c.

In inland bills no other than Com Law Damages are allowed. Bowes 461.

When interest is allowed it is calculated to the time of rendering the judgment. 2 Burrow 96.

There is a species of Draughts where the Drawer does not intend to be charged. As when he requests one to accept of a Draught, & charge another with it. Then the Drawee has no claim upon the Drawer. But in all other respects the Drawer is bound as in other cases. To any person even the Drawee may accept it for the honour of the Drawer & not him. Bowes 456.

It may likewise be accepted for the honour of the ~~Drawer~~ Indorser, or Drawer, by a Stranger.

Notice for non acceptance is also necessary. Bowes 458. or 58.

If a Bill is accepted for the honour of any person it must be inserted in the acceptance. If accepted by a Stranger without any insertion it is presumed to be for the honour of the Drawer. If for the honour of any indorser it holds all the previous indorsers. If for the honour of the Drawer it entitles the Drawee to look only to the Drawer. Bowes 458 or 38

When a bill is accepted for the honour of any person protests are necessary; If the Drawee does not expressly approve of the acceptance.

If the Drawee accepts & does not pay, he becomes answerable to the Drawer for the damages he sustains. Here the Law goes upon the presumption that the Drawee had effects, or he would not have accepted. 1 Will 185.

But if he in fact had no effects, he is not answerable to the drawer for damages. After acceptance the proof of this fact lies upon the drawer.

A drawer may accept for the honour of the Drawer. Burrows 454.

At Com Law while a contract is executory, it may, with the assent of the parties, be broken up by Parole; but after a breach a release is necessary; otherwise it would be a Parole discharge of a right without any consideration. — By the Mercantile law a right of action may be given up by a verbal discharge: as a verbal discharge of an acceptance. Doug 237. 249.

Taking a new security of the drawer, is not an abandonment of the acceptance. Doug 238 note 250.

The effect of an acceptance varies in different Countries. At Lyons if a bill is accepted & the acceptor finds before the time of payment, that the drawer is a bankrupt; he may, by a process of Law, vacate the acceptance. Doug 238. 250. (Pickey 733).

It has been determined that a [illegible] payment of the drawer does not discharge the acceptor. It was formerly held that a receipt of part of the money from the drawer discharged the drawer & endorsers. But it is now otherwise. 2 Str 744. 2 Str 745. Bul NP 271. [illegible] 262. (2)

It was formerly held that you must always apply to the drawer, before you could come upon the ~~accep~~ endorser; but modern decisions oppose the idea. 1 Str 441. 2 Burr 669. The same rule holds with inland bills.

It is questioned [illegible] a holder is obliged to accept of an agents acceptance? Against his acceptance it is contended that it is a source of inconvenience to the holder, by multiplying the parties. Esp NP Rep 115. 269. (1)

Of the nature of the remedy

on a bill of exchange or negotiable note.

In some instances the parties have a remedy at Com Law. These instances are between the immediate parties as the drawer & payee, for between them there is a privity of contract; where this privity of contract does not exist, you must rely on the custom of merchants for redress.

The ancient manner of declaring, & which now prevails in some of the European countries, was to set out at length the custom, & then to state the case to be within it. This practice is now done away in Eng & the United States. 1 Dba 21. 1 Will 189.

(1) Judge Kent apprehends that if the agent produces his credentials, the vendee must accept of his acceptance; but it has lately been doubted & is now a question. Sugd V&P 115. 289.

(2) Provided timely notice is given of such receipt.

(1) The word endorsed implies a delivery, thereupon a delivery need not be ~~stated~~. Formerly it was necessary to state that the drawee had been first applied to, this however is not now necessary.

The practice now is to declare generally, that according to the Custom of merchants, such & such things are done. If however a particular custom of any particular place is declared on, it must be stated. 3 Mod 226. Carth 83. 170. 1 Show 130.

In an action on a bill of exchange, it is sufficient to state that the drawer made the bill, & directed it to the drawee. The averments must be made according to the legal acceptation of them. As when a note purports to be given by two, but is signed by one only, the legal acceptation is that it was given by one only 1 Ven 313.

In a joint bill or note, all the obligors must be sued; in a joint & several all or either of them may be sued, & the single imports in, either joint or several. 2 Doug 545. 2 Str 819. Comyn 392 n. 632.

When payment is to be made within a limited time after date, the date must appear in the declaration.

If the bill is drawn by an agent, that fact need not be stated, it is sufficient if it is stated that the principle drew it.

It must also be stated that the drawer delivered the Bill to the payee, who presented it. That it was refused, & was protested.

It is not necessary for him to state that he sent it by the first post.

The word endorse implies a delivery, therefore a delivery need not be stated.

If the action is brought against the acceptor the statement is as above, also that he accepted the bill according to the tenor of it, even tho' he did not accept it according to the tenor, for the acceptor is bound altho he accepted it different from the tenor. 2 Str 817. 1 Doug 364. 1 Salk 127.

If the endorsee brings the action he must state as above, also that it was endorsed to him, that he presented it & got it protested. If the action is against the acceptor, that he accepted it.

If the endorsement is special, it must not only be stated ~~that~~ as above, but must also state ~~to~~ that ~~[illegible]~~ it was endorsed to the intermediate endorsee & from the last to him. (1) If the drawer paid the bill, without effects of the Drawer in his hands, an action at Com Law will lie. 1 Str 264.

These declarations usually assume the form of raising a promise at the end, as in consequence of his liability he promised to pay.

It is a question whether it is necessary to state such a promise. Judge Reeve thinks it is not necessary; for in consequence of the above facts the law implies a promise. This has been so decided. 1 Doug 508. 1 Salk 128. Carth 209.

By the Com Law, as well as by the Law Mer. you may prosecute all ~~prosecute~~ the secondaries at once & the same time, but you can obtain but one satisfaction. When the satisfaction is obtained, you recover the costs that arose on the other actions against the other secondaries. by pursuing the different actions to judgment, & the court will give nominal damages & the costs.

If the Bill is not satisfied until judgments is obtained on all the secondaries; execution on the other judgments may be taken for the costs of those suits. If executions are required for the full amount, the [illegible] cannot deny them, but it would be considered a high contempt of the court. 1 Bill 749. 2 Doug 115. 1 Str 514.

Of Recp in these actions

In an action brought against the acceptor, the holder is not bound to prove the Drawers hand writing. The [illegible] stance of his accepting is sufficient to establish that fact, for he is supposed to be acquainted with his correspondents hand writing. — This rule must be understood to apply only to those cases where the acceptor has seen the bill; for if the acceptor without seeing the bill he only accepts those bills which are true, & the hand writing of the Drawer must then be proved. 1 Esp 445. — Str 641. 3 Bur 1354.

The acceptors hand writing must be proved; if the acceptance was parol, proof of that is sufficient.

When there is an endorsement, the endorsee must prove the endorsers hand writing, for, without evidence of that fact, he shows no title in him to the bill. — The law does not presume the acceptor to know any thing about the endorsers hand writing. 1 Doug 654.

When an acceptance is conditional the event must be proved to have happened.

In an action by an endorsee against the Drawer the following things must be proved.

The endorsee must prove the Drawers, & endorsers hand writing.

In Case of non acceptance the endorsee must prove that it was presented, that he caused it to be protested; & that there had been no [illegible].

When accepted, but not paid he must prove the Drawers & endorsers hand writing, that it was not paid, & that legal notice was given.

When the endorsement was blank, you need only prove the first endorsers hand writing. If the endorsements are

(1) Proof of the confession of the party that it was his signature is no proof.

(2) An agent must prove his agency.

If special you must prove all the endorsers hand writings.

When an endorser dies an immediate endorser is need only prove his hand writing. If any of the other endorsers be dead, if the endorsement is special, prove all the intermediate endorsers hand writing. If the endorsements are blank, he need only prove the hand writing of the one dead. 1 Doha 174. Stra 444. 2 Ther 675.

Protests are proved by witnesses there, this is conclusive the law will not admit the presumption that they are forged. The party dead is not however debarred from proving it to be a forgery.

When no notary is to be had without great trouble & expense, a practice has prevailed of procuring two or three respectable men to execute a protest.

When a Payee sues an acceptor he must prove the acceptors hand writing with a [illegible] of payment. Acceptance raises a presumption that there were effects, but this may be rebutted. 10 Mod 86. 1 Will 105.

When an acceptor sues the Drawer, he must prove that he had money of the Drawers effects in his hands at the time of payment. He must likewise prove that he paid it, & the hand writing of the Drawer.

Imprisonment is in law a satisfaction of the Debt during the confinement, & will support an action on the ground of payment. 3 Will 18.

An Acceptance for the honour of the Drawer raises the presumption of Effects.

In promissory notes the same rules must be observed applicable however to different characters, as has been before observed.

Writing is proved by one who sees a writing to be signed by one who knows his hand writing, or similarity of hands. (1)

Assent to Act is proved either by a power of Attorney, or a parol empowerment, or a habit of doing & a recognition of the acts of the agent as if he had power to act. (2)

To prove notice by letter it is sufficient to prove that you post the letter in the office.

When a default is suffered by a Deft it is not necessary to prove his hand writing. 3 Burr 29.

Accommodation notes are those that are given without any consideration, & merely for the purpose of being negotiated. If they are not negotiated they cannot be recovered upon. If they have been they can. — 1 Str 445. 3 Burr 1354. Cowp 341.

When instruments are negotiable, & are in third persons hands, they can generally be recovered upon, altho' the consideration is illegal. Doug 636. n 655. Cowp 341.

The exceptions to this rule are when notes are given upon usurious or gaming considerations. Then they are void to all intents & purposes. Str 115. Doug 640 Cowp 343 Hatter.

But even in these cases the endorsee may sue the immediate endorser upon bona fide principles.

Of Bank Notes.

These are substantially the same as bills of exchange, but in some respects are considered more as money.

When a man wills all his money bank notes are included; but bills of exchange are not. So an agreement to transfer all the money a man is possessed of, includes them.

Whether a tender of them is legal is made a question. There is a decision in Equity which declares them good if there is no objection. — ~~There is however~~ In this case the man who tendered said that he would turn them into money if there was any objection to them, but none was made. 3 Dane 336. The following authority seems to imply that they are a tender. 3 Ve 534.

Of Checks & Bankers Draughts or Notes.

When a bankers note, or a check upon them is accepted, the law imposes a condition that payment be demanded within a reasonable time. 12 Mod 744: 1 St 415: 414: 900: 1175.

If the money cannot be procured from the bankers, you may come upon the endorser for it. 1 Bla 364.

What is a reasonable time to make a demand is a remains a question. When a note was given in the morning & payment was not demanded till the next on the following day, when the banker had failed, the holder upon the bottom, in the law considered it an unreasonable time. Somewhere about four & twenty hours would be considered a reasonable time. Stacy 1175.

(1) A bottomry bond is a bond given for money received to freight, repair, or load a vessel, to receive as much as is agreed on, on the security of the bottom of the ship. This bond may be insured.(a) (a) 2 Ven 717. 2 Burrow 1394.

(2) The law is the same when an individual as when a company insures.

One insurer is not answerable for the failure of the others.

(3) The prevailing opinion in this Country is against them.

(4) When there is more subscribed for the assurance than the real value of the vessel, & the vessel is lost; the insured can recover no more than the real value of the vessel, all above is void.

(5) From these decisions we may collect, that the right to abandon must arise upon the ship or the insurance being so far defeated, that it is not worth his while to pursue it; such a loss as is greatly inconvenient to him as if it had been total. For instance, if the voyage is absolutely lost, or not worth pursuing; if the salvage be very high, suppose a half; if further expense be necessary, if the insurer will not engage at all events to bear that expense, though it should exceed the value or fail of success; under these & many other like circumstances, the insured may disentangle himself, & abandon notwithstanding there has been a recapture. Park 145.

Of Insurance

Under this head is treated of insurance upon property at sea only.

The contract is always entered into in writing. This instrument is called a policy of Insurance. It is entered into when the safe arrival of ships & of goods is insured. (1)

The money paid for the insurance is called a premium.

When any loss insues the insurers pay in proportion to their subscription. 2 Atkins 200. (2)

A policy thus is a bet which avoids policies where the insured has no interest in the property.

Whether the Law Merc will allow it is made a question! In France it has been decided one way, & in the Netherlands another. It seems to be opposed to the spirit of the Law Merc that they should be protected. The Law Merchant is established for the encouragement of commerce, the protection of these policies would only go to the encouragement of gaming. 2 Bonnier 717. 3 Bro. 1394. (3)

When there has been a loss the insured may in some cases abandon & recover upon the insurers.

If the salvage does not amount to the freight, the insured may abandon it, & recover upon the insurers for the whole property insured. If it does amount to the freight, they cannot abandon. But they may recover upon the insurers for the deficiency. Stra 1065

When the vessel has been captured it is a general rule that the loss is total, & the insured may abandon. 2 Bro 505

But this rule there are exceptions. But he thinks that in all cases where the news of the capture reaches the owners, they may abandon. But if a mere hindrance or trifling damage ensues from the ~~[illegible]~~ capture, they are not at liberty to abandon. If the vessel has been ransomed it is not a total loss, & the insured are not at liberty to abandon. 2 Burr 1198. (5)

If a man sues for a total loss & only a partial one is proved, he may recover as for a partial loss, & with that declaration. 2 Burr 904.

The insurers upon an abandonment, stand in the shoes of the insured, & are entitled to all that they would have been. 1 Bosq 90.

Where a vessel was taken, retaken & ~~lost~~ to pay the salvage. ~~—~~ It was decided to be a total loss, notwithstanding an moiety of the money might be obtained upon application. 3 Atk 195. 1 Will 191. 4)

It is a total loss when vessels are embargoed by nations both when ~~—~~ a nation is not at open war.

If property is insured generally, & is in fact lost at the time of insurance, the insurers are not liable. But if the words "lost, or not lost" are inserted, the insurers are liable at all events. 2 Laurence 700. Thom 324. In the first case the premium must be returned.

If a ~~the~~ property is insured "from a place", the insurers are only liable for loss which arises while on the voyage; if the insurance is "at & from" then they are liable for all losses which may arise while there.

But if the payee that was insured was given up; or if the vessel lies idle in port without any preparation for the voyage, the insurers are not liable for the losses which happen. 2 Atkins 359. (1)

If when a ship & freight is insured, as is often the case with freight ships, the ship is lost while in port, the insurers are only liable for the ship, & not for the freight which she might have earned. (2)

There are many things which will prevent recovery on Policies of Insurance.

Any species of fraud, as well as concealment or falsehood, will void the Policy. Thus, for instance a vessel was insured, when the owner had information of her being seen at sea in a leaky state, & concealed the fact, & she was afterwards captured, ~~the~~ no recovery was allowed, on account of the fraud and to prevent the Policy. Stra 1085.

Procuring one person to underwrite, with a promise of indemnity, in order to induce others, is a fraud which will vitiate the Policy.

Not telling his opinion upon a subject which every man can inform himself, as of the probability of a war is not fraud. But if he had secret information of the declaration of war, or of the sailing of an enemies fleet into their parts, it would avoid the policy. 3 Burr 1905.

Whether a policy of insurance can be explained by a parole agreement, authorities are not agreed. But there seems to be ~~no~~ no — Why this should be excepted from the Stat of frauds & perjuries. Judge R — knows of but the two following cases upon this point. Salk 444. Shermers Reports. There are contradictory. 1 Atk 545

Misconduct in the master, altho' not fraudulent, will often release the insurers. As if the property was lost thro' the captain, (who is the owners agent) not calling a pilot when it is customary to employ one. So if it had been lost thro' the misconduct of the Pilot, yet the Pilot is the owners agent. — A policy has likewise been held void to the Insurers, because the vessel was lost by means of Captains sailing at a certain season in the hope to meet with other all other vessels thought it imprudent to sail

(1) If the vessel pass a different voyage than the one insured, & is lost, the insurers are not liable. 2 Atk 359.

(2) Insurers are always liable according to the nature of their contract; when therefore a vessel was insured against the perils of the sea, & was captured, the insurers were not answerable.

(1) Departing with convoy means departing with one which is going to the place of destination.

(2) If there has been an actual risque run on the voyage after the vessel has departed with convoy the insurers may retain the premium. If the risk is run in going to the convoy, the premium is to be apportioned.

But insurance may be made to answer the good conduct of the men. When there is such an insurance the Insurers have the power of naming the men.

If there is a deviation from the insured voyage by the fault of the insured, the insurers are released. Stevens 324.

When it is the intention of the insured before departing to vary from the insured voyage, yet the insurers are liable as long as they continue in it. Stev 329.

When pirates have been plundered by the insured, the insurers are released.

If there is an insurance against thieves, it does not cover, specially mentioned, extend to the Captain & Seamen for they are the agents of the insured.

Thieves according to their complexion in the Law Merc, mere plunderers of the seas, & not robbers in Inglewood.

If there is an insurance conditioned to depart with convoy, & they do not depart with convoy, the premium must be returned. 3 Lev 320. 6 Mod 80. 1 Salk 445.

If the departure is not thro' any fault of the insured the premium is considered as if it continued with it.

When there is a usual place for the Convoy to depart from, as the Downs & Spithead on Eng, the insurers run the risk in that the vessel is under to join it. Salk 443. Stev 1268. (1)

If it is a general rule that they are said to run, no premium is to be paid.

When an Convoy when a part of the risk consists in place of the premium, & when part of the risk consists in the premium.

If a vessel is insured after it joins the Convoy, & the Convoy departs without it, no premium is to be paid for there is no risk.

But if a vessel was insured after joining convoy of Captain Cooke & the day after its departure it sunk, yet the insurers are entitled to the whole premium. (2)

If a vessel after insuring is ordered on the pressing service, it is considered as being still on the voyage. Stevens 1268.

The goods discharge in a foreign port are unladen. He knows of no method to compel a discharge.

A ship is never considered as discharged until the goods are delivered on shore by the Ship's boat, or into other boats. Stev 1256.

Perils of the Sea mean Ship wrecks, tempests &c 2 Roll Rep 80.

When there is an insurance, except as to captures, & the vessel is not heard of after, the presumption in Law, after a certain time is that the vessel foundered. Stev 1149.

In an insurance against the bad conduct of the Master, the word "barratry" is commonly used to express it. By barratry is meant all kinds of fraud, embezzlement &c. Park 1073. 1264. turning about willfully from the insured voyage; or changing the voyage to a [illegible] Simple purposes, comes within the signification of barratry. (1) ~~and illegal navigation contrary to the laws of the country.~~ But mere negligence is not.

Any navigation contrary to the laws of the country, as not paying customs &c excuses the insurer from the effects which may flow from it. 2 Clerson 178.

The Restraint of Princes is sometimes insured against; this usually means embargoes; not restraints for past practices.

Charter-parties & Freight

If the Charter-party is for the freight of the Vessel generally, to go a voyage. If it is lost either on the outward or inward voyage, no freight can be recovered. If the agreement is for each voyage separately, as so much for the outward &c so much for the inward, the freight could be recovered for the outward voyage, after which the vessel was lost in its homeward voyage. Ibid p. 6. 2 Clerson 212.

If a vessel after being chartered for an inward freight, arrives at her outward, returns without one, it then appears no fault in her on chartering that she was not laden, so no freight can be recovered. If for instance there was no freight to be [illegible] of the kind contracted for. (2)

If a master returns empty before the expiration of the time allowed for loading, no freight can be recovered.

If goods are lost thro' the masters fault, the freight can be recovered notwithstanding; remedy for the lost goods must be obtained by an action for them.

If damages has been done the good by the masters default, he is answerable for damages; but he takes the freight unless the owner thereof abandon.

If the vessel is disabled from proceeding, after having performed part of the voyage, if there is no any fault, a proportionate part of the freight will be allowed. (3) Park 882.

When the contract for the freight of ships, is not by Charter-party, but by parole, there is a practice among Merchants to give earnest money, which is forfeited upon the non-fulfilment of the contract. If the master renders upon the contract, double earnest money is allowed.

The owner of a ship is always liable for any damages thro' the default of the Master: and the Master is liable over to him. This liability exists even when the owner was not privy to the contract. This liability therefore does further than the [illegible] servants. (4)

(1) If the master is obliged to turn thro the mutiny of the seamen, it is not barratry. Cha 1264.
(2) But if the failure of freight was owing, to the Charterer, or his agent or factor, freight is recoverable.
(3) If the vessel is disabled without the default of any one, the master may stay at the port a sufficient time to refit even longer than the time which the voyage was agreed to be performed in if necessary. If he pleases he may also charter another vessel & bring the goods home. Ven 882
If the vessel becomes unfit to pursue her voyage, a rational portion of the freight can be recovered.

(4) Freight is the mother of wages, & where there is no freight, no wages are due. — If a ship be lost before it comes to the delivering port, no wages are due, if lost afterwards it is due to the last delivering port. — Advance money paid before, if in part freight, & owned so in the Charter party, although the ship be lost before it come to the delivering port, yet wages due according to the proportion of the freight paid before; for the freighters cannot have their money. 2 Show 291.

Of Mariners.

If Mariners are entitled to the wages they contract for, as the contract is. But by a law of Merchants if no time is specified when the wages are to be paid, they are entitled to what they have earned at the outward port, & if withheld from them, they can recover interest upon their wages due from that time.

If a seaman contracts for so much per month, & not to receive his pay till he returns, if on the return the vessel is lost, it has been determined he shall be entitled to those wages due at the port of delivery. 2 Vern 728: 1 Ld 179.

If Mariners have so much per voyage, they shall be entitled to half at the port of delivery.

In case a vessel is captured the mariner loses all his wages, if however the vessel is recaptured he obtains half, ~~the other half going to those who recaptured her~~ given. Must hire a place where for he must pay the proportionable part of the salvage.

If a mariner breaks a debate on board by which is meant a quarrel, the master of the vessel may ~~set~~ dismiss him at the first port, for a sailor is a citizen of the world; & if he allows him to stay he cannot receive his wages.

If a sailor conspires to force a master from his voyage to take a different course, it is a capital offence.

The sailors must remain on board till the ship is unladen. It is their business not only to work the ship but also to load & unload it. But if no porters can be found, they are to do the office of porters; they are paid for that over & above their wages.

If a sailor desists from doing, or refuses to do his duty of any kind, he cannot recover his wages.

It is a privilege of merchants that they may stop the goods which they have sold in transitu, if it can be done before they reach the possession of the vendee, having found out that the vendee is a bankrupt.

(1) It is true if any debt is recovered, the debt is recovered in the name of Survivor, & the Survivor must be sued, tho' if Judgment is obtained against the Survivor who is a bankrupt, that Judgment lays a foundation for a bill in Equity to recover it of the Executor. In Eng it is recovered at Com Law Courts.

Partnership property whilst the Partners are solvent, is liable for the Private debts of each party, tho' if the property is sold, it is usual to sell only a moiety of what is taken; yet sometimes the whole is sold & a moiety of the price is returned to the other Partner. 1 Ch 1

When Partners in trade become bankrupts the Law of bankruptcy goes on the ground that the bankrupts are unable to pay their debts. Then the Private fund goes to pay the private debts of each Partner, & the estate of the firm goes to pay the Company debts. If the private debts are not as great as the private fund, the overplus after the private debts are paid goes into the firm to help pay the company debts. If there is a surplus of the company fund that surplus is devided between the Partners.

Altho' the owners except, are in all cases liable for the contracts of the Master, yet for the misconduct of the Master & Mariners they are not liable unlesse they are actually in the employ of the owners, Tho' there is a Stat regulating the owners liability. In Eng, they are made liable to the whole extent of the Ship. Abbott Shipping 215. This stat limits it to value of ship & freight earned & the Com Law

A Majority of the owners of the property of a Ship can direct the voyage. 1 Show 93.

In this case there is no compelling the other owners to furnish their proportions, ~~But those owners who~~ Tho' of those been alluded to in a ~~do furnish to can compel the others by an action to~~ pay their proportion, in for the majority to compel the minority to furnish their proportion for preserving the vessel. applying to the Court of Admiralty & taking it out of the hands of the minority upon the libel for security.

In case some of the owners are obstinate, & will not furnish, the other owners, by going to a Court of admiralty, & in Eng to the District Court, & there offering to give security that in case the vessel is lost, they will pay the proportions of those who will not furnish, they receive all the profits of the voyage. Cath 27: 2 Ray 235.

It is a principle that when the master buys necessaries, both him & the owners are liable unlesse the necessaries are sold expressly on the credit of the owners only, this exculpates the master. 2 Str 645. Hardwick 376.

See the next preceding page but one. ✠

The owner is likewise liable to any man who furnishes money to answer the necessities of the ship; & this altho' entire ignorant of the contract.
This liability of the owners exists, even when he is not privy to the contract for the voyage. Hardwick Rep 85. 194.

Partnerships & Seamen.

The jus accrescendi does not prevail [illegible]
[illegible], Co Lit 182.
They are strictly tenants in [illegible]
The Sea is owner of the property of the partnership, as much as the survivor. The living partner does not hold it solely, in order to account to the Sea, tho it is sometimes supposed. If this were the case, the creditors would not [illegible] the survivors power to pay. Every right that the survivor has the Sea has, excepting that of seizing & taking sand.
About a century since it was the practice to join them, but it has since been [illegible] upon principles of convenience
1 Q Bury 265. 1 Atk 444. 1 Show 189. (S. pay 773

Of Factors & Agents

There are men who are employed in foreign countries to act as agents in mercantile [illegible]
If a factor, who is not generally known to be [illegible] sells goods the purchaser is not liable to the principal. But if a person is generally known to be a factor the purchaser becomes debtor to the principle, tho they may pay the factor. If however the principle forbids the debtor paying the factor they may not. Comp 255.
One person may be the factor of [illegible] principles [illegible] one. [illegible] generally receive a commission. When the commission allows them to sell, it does not imply a power to credit. Gilb 202. 2 [illegible] 100. 1.
If a factor sells goods of his own upon credit, & is allowed to sell the goods of his principle upon credit, which he accordingly does, if he receives money [illegible] the same person, he must first apply it to the principle's demand.
If a factor suffers by the principles misconduct, the principle must satisfy him. As, for example if the principle should send damaged goods, not informing the factor thereof, who sells them as sound, and is afterwards obliged to respond in damages; the principle must satisfy him for the damages which thus accrue. Comp 142.

So if the principle suffers by the factors misconduct, the factor must answer the damages. A factor was employed to sell a stone, by misrepresenting the quality of it, he obtained a great price; for this fraud the principle had to respond, but the factor was held liable to the principle for the damages which his misconduct had brought upon him. Cop 143.

The lien of a factor is as absolute as that of the principal, even if the goods were bought in satisfaction of the factors Debts. But the factor can not pledge them for his Debt. Stra 1178.

If a factor does not pursue the terms of his factory he forfeits his commission. — Stra 1182. 2 Vesey 239.

Factors have a lien upon property for what is due them. Not only for what is due as damages, but for the ballance of the general account. And to answer these demands they can hold in defiance of Bankrupt Assignees. Bro 489.

If a factor receives money for his principle & pays it apart for him so as it may be identified, the principle is entitled to it at all events. The factor is not here considered as a Debtor but a trustee. — But if he pools it with other monies, he becomes a Debtor; and in case of Bankruptcy or insolvency, the principle is entitled but to his share.

If a factor is directed to insure & does not, he is liable for any loss that occurs. 2 Vesey 239.

In general the principle of Law is clear; that if money be mispaid to an agent expressly for the use of his principal, & the agent has paid it over, he is not liable in an action by the person who mispaid it: because it is just, that one man should not lose by the mistake of another. Cow. p 566.

It is only for gross neglect or wilful abuse of power that the agent becomes liable to his principal. Cow p 479

But when a factor to one beyond sea buys or sells goods for the person to whom he is factor, an action will lie against or for him in his own name; for the credit will be presumed to be given to him in the first case, & in the last the promise will be presumed to be made to him, & the rather as in it is as much for the benefit of trade. Bull N P. 130.

However the factors sale does by the general rule law create a contract between the owner & buyer, I

& therefore if a factor sell for payment at a future day, if the owner give notice to the buyer to pay him & not the factor, the buyer shall not be ~~the~~ justified in afterwards paying the factor. Yet perhaps under some particular circumstances this rule may not take place; as when the factor sells the goods at his own risk & is answerable to the owner for the price, though it be never paid) for in such case he is debtor to the owner & not the ~~factor~~ buyer. Pickle N P 130. Lex Merc Mem 481.

If the vendor takes upon himself the delivery of goods purchased to the vendee, he stands all risques; but if the vendee points out the particular mode of conveyance by which the goods are to be sent, & the vendor sends them accordingly, & they miscarry, the vendee must stand the loss. Coop 296. 14 Esp Dig

When an agent is employed to buy goods his acknowledgement that he received them is as good evidence against the principal as if he had acknowledged it himself. 3 Burr 454. Contra. The Plff offered to produce a letter from the agent of the Deft. The Deft insisted that the ~~letter~~ agent should be called: that the letter should not be produced. Lord Kenyon said that he would admit evidence of what the agent had done, but that that should be learned from himself, not by his letter. Alexander vs Abraham 1 Esp R 375

When a factor sells goods as a principal, & the buyer has no notice of the seller's being ~~factor~~ only a factor, the factor shall be considered as to him a principal; & it is a good answer to an action brought by the real principal, that the factor is indebted to the buyer of the goods, & that he holds them for such debt. Grove vs Blazard & Prate 2 Esp Rep 557.

Of Agents

It is only for gross neglect, or wilful abuse of power, that the agent becomes liable to his principal, ~~[illegible]~~ Comp 479.

Partnership, & Seamen

The master of a Ship is no more than a servant of the owners, he hath no other property either general or special, but the property he hath is given by the Civil Law. 3 Mod 323

(1) Indeed in whatever property a person can have a fee simple, a fee tail, or a life estate in, is real property. Therefore an incorporeal hereditament is real property.

Of Real property

How real property differs from personal is hard to convey by a definition. A description of the two kinds of property will give the most accurate ideas of them.

It is generally true that real property is immovable & personal property is movable. But an estate in lands for years is personal property. Real property always goes to the heir, & personal to the Executor. But yet an estate for life which is real, terminates with the life of the tenant.

Estates in fee simple, fee tail, & for life are real estates; their Estates for years are personal. The first class goes to the ~~heir~~ heir, the second to the ~~heir~~ Executor &c. There is such a thing as an incorporeal hereditament. By corporeal hereditaments is meant lands, that is earth & every thing annexed to it, as houses, fences, trees, water, & every thing adhering to the soil, and also every thing above or below ~~it~~ is conveyed by a transfer of a corporeal hereditament. Incorporeal hereditaments are not the objects of sensation, they can neither be seen nor handled, they are creatures of the mind, & exclusively in contemplation. They are not lands, but an estate may be had in them of several kinds. By this is a right of this nature, or is a right or tax &c.

Real property can only be conveyed by writing. But it will pass by descent without writing.

There are but two ways of acquiring real property; by purchase & Descent. Any other method of acquiring property than by succeeding to it as heir, is called acquiring it by purchase.

Property laying on land, as rails, cleaved to land &c does not pass by a conveyance of Land. But every thing growing passes unless excepted.

Emblements are the produce of annual labour, or the annual production of a man's labour. By this nature are wheat, corn &c.

Emblements go with the land when that is conveyed by Deed, in the same manner as house, fences &c. But when land descends, the emblements go with the personal fund. If land is conveyed by Devise under such circumstances as to make it probable that the Devisor intended the emblements should go to the Devisee, then they pass with the land. If, for instance, a man devises land upon his death bed, then the Devisee would probably succeed to the emblements with the land. But the law upon emblements in Devises, is not clear.

Various kinds of estate may be had in land. As fee simple, fee tail, Estate for life, for years, an encumbrance, Devise & at will; an estate at sufferance is sometimes added but this is included in the last

No other estate than these here enumerated can be conveyed in land; any attempt to create any other species of estate ~~[illegible]~~ be void.

A Fee Simple Estate is one where a man has absolute dominion over, free from all encumbrance; and which upon a man's Death goes to his heirs generally, if not otherwise disposed of. A Fee Simple estate is created by the words "heirs ~~[illegible]~~ forever." (1)

A Fee Tail estate is inferred to a man & the heirs of his body. It is created by the words "to A & the heirs of his body."

An estate for life means what its name naturally imports.

An Estate for years is for any limited term.

Tenure for will is such a tenure as is only held at the pleasure of the Lessor.

An estate cannot be given to a man & his heirs forever with a condition not to alienate. For this reason but for an estate after any of the above descriptions. Thus, for the same reason, to a man & his male heirs.

Fee simple estates may be conditional, that is depend subsequent upon the happening of some event.

There is an estate called executory devise, which is created by will, which ~~[illegible]~~ forms an exception to the rule that no other than the above estates can be created in Lands.

Of Fee Simple Estates.

From the system of feuds has originated the idea of escheats; because the land thereby goes back to the original Donor.

These ideas of escheats originated with the feudal system. Before that time lands were allodial.

In this Country all lands are properly allodial. We have no escheats. By there is a total defect of heirs the lands, but for the State which vests them in the State, would be in a state of nature, open to the first occupant.

By our Stat lands do not go to any particular set of heirs. Thus in the Nature depen lake first & generally.

To create a fee simple estate words are necessary & absolutely so. The words which originally were absolutely necessary "to a man & his heirs forever". Now the words "to a man & his heirs" omitting "forever" will suffice; but there ~~[illegible]~~ absolutely is indispensable to the conveying a fee simple by Deed.

The word "heirs" is not made use of to limit the estate to them; but to show the quantity of estate. The man thereby has heirs while living.

(1) A Fee Simple may be conditional, but as long as it continues it is a fee; as a Mortgage.

The word "heirs" in a fee is introduced to describe the quantity of the estate given.

The power of Devising, or of the heirs to succeed to an estate is incident to a fee simple.

The incumbrance of the wife's dower is another incident, and one which cannot be dispensed with by any act of the owner.

In a will, other words will convey a fee simple than in a deed. In a will a Devise of the "fee simple" of an estate, will convey that interest; and so will "to him & his forever", or "to him & his assigns forever", all in deed. In a deed words convey but an estate for life. — In a will it is immaterial what words are used, provided they indicate an intention in the Devisor that a fee simple should pass.

The reason of this distinction between Deeds & Wills is. The first rule was established two hundred years before the other. At that time persons possessed were shackled with contracted legal notions. They could by deed but two hundred years before they could by Will. It was not till the reign of Hen. 8th that this idea was overruled. This may be given as the reason why a distinction which to the eye of reason is frivolous became established.

It is a maxim, and a very important one, that in the construction of Wills, the intention should be pursued if consistent with the rules of law. In pursuing this maxim it is sometimes contended, that the word "heirs" must be used in a Will, to convey fee simple, because the Law requires it. — These words "rules of Law" are not to be understood, apply to the words made use of, but to the estate given. If a man should devise an estate tail in a piece of personal property it would not pass, for the law will not allow such an estate in personal property. An estate to a man & his heirs would not pass for the law recognizes no such estate. —

Fee Tail

This species of estate is abolished in some of the States; what is the case in New York. In Con & some of the other States it is limited. And in some it remains as at Common Law.

This species of est originated from the ambition of preserving and ennobling the great families in Eng.

The first method was to devise an estate to a man & the heirs of his body, this for a length of time prevented the possessor from disposing of his property, & it was supposed that it must descend in infinitum to the heirs of the possessors body. This estate was not Inheritable for treason. It was called a fee simple conditional. The Judges for a long time laboured hard to overthrow this estate; which easily they might have done, for it manifestly was an estate of which the law did not know; however they took a less obvious method. They considered the estate as becoming absolute, a a fee simple, as soon as the possessor had heirs of his body. They to accomplish this, called it a fee simple, a condition that he has issue. & Now we must observe, that when any condition is performed, it is thereafter entirely gone; & the thing to which it was before annexed, becomes absolute, & wholly unconditional. So that, as soon as the grantee had any issue born, his estate was supposed to become absolute by the performance of the condition; a at least for these three purposes. 1 To enable the tenant to alien the land. 2 To subject him to forfeit it for treason. 3 To empower him to charge the land. This construction by courts for a long time tormented the minds of the nobility, & after much exertion they obtained in the reign of Edward 1st a Stat which is called the Stat De Donis. The provisions of this Stat were that lands given to one & the heirs of his body should descend down from generation to generation ad infinitum according to the intention of the testator; this gave rise to Estates Tail.

By construction of Courts the operation of this Stat has at length been got rid of. — See over leaf.

~~"His first sentiment was to devise an estate" to a man & the heirs of his body." This for a longer time~~

(1) Indeed, in wills & testaments, wherein greater indulgence is allowed, an estate tail may be created by a Devise "to a man & his seed", or "to a man & his heirs male", or by other singular modes of expression. Co Lit 9. 27.

Or to a "man & his children", if he has no children at the time of the devise; or "to a man & his posterity", or by any other words that shew an intention to restrain the inheritance to the descendants of the Devisee. H Bl 447: 6 Co 17.

If an estate is granted "to one & his male heirs forever" this is granting an estate which the law knows not of, & is not good. It is not a fee simple, because it is restricted to some particular heirs; it is not a fee tail tho' an in words of procreation; for the words of procreation & inheritance are necessary to the creation of this estate

(2) In this state the Donee cannot dock the entailment.

It has also been decided in our courts that the wife shall be endowed of such estate.

The construction which the Judges put upon entail ments, defeated this intention. They decided that upon a man having issue the estate became absolutely vested in him.

To remedy this, after much contention, the Statute De Donis, in the reign of Edward the first was passed. This Stat enacted that entailed lands should go down thro' successive generations without the power of alienation. This seemed them for some time; but finally the practice of docking entail to obtain the protection of the Courts. This has in a great measure defeated the object of estates tail.

The words necessary to create an estate tail, are, "to a person & the heirs ~~female~~ of his body." They may be restrained to the particular heirs of his body; as to heirs male or female. Or heirs male or female by a specified wife. The first kind is called an Estate Tail general. The second an estate tail male or female general. The third an estate tail male or female special. Co Lit 13. (1)

To by the oldest son is the heir, he consequently succeeds to an estate when it is to a man & his heirs.

If there are no sons the females succeed equally.

There are several species of estates Tail - viz. Estates Tail General and Estates Tail special, Tail male or female General, & Tail male or female special.

Estates ~~tail~~ Tail General are created by the words "heirs of the body" without any restriction.

Estate tail special are such as are restricted to some particular heirs of the body. 1 To heirs by a particular wife. The incidents of this estate are liability to the Dower of the wife. 2 The Donee is not liable to impeachment for waste. 3 It can be docked & turned into a fee simple at the pleasure of the tenant.

To Con Estates remain entailed only in the hands of the Donee. (2) The Donee's heirs hold it in fee.

There is a species of estate called Estate Tail after possibility of issue is extinct. This exists when it is not possible for the entailment to happen; as when a wife, from whose body the heirs were to spring, is dead.

Collateral relations cannot take an estate Tail.

No other persons but Tenants in Tail are exempt from punishment for waste. Tenants for life & years forfeit their estates by waste.

Estate for Life

Of this class of estate there are two general divisions. One is created by contract; and the other by operation of law.

When an estate is conveyed for one's own life, or for the life of another it is said to be created by contract. An Estate by curtesy or dower is one that is created by operation of law.

An estate which has no period put to it, & which may by possibility last for life, is called an estate for life. No definite period of years will ever be considered as amounting to a life estate.

When a man holds an estate during the life of another, & dies before the person ~~for~~ by whose life it was limited, the common law makes no disposition of the remainder. ~~[illegible]~~ By the Stat of Chas. Reversion ~~the~~ it goes to the Executor.

At Com. Law it could not go to the Ex because it was a free hold; it could not go to the heir because it was only a life estate, it therefore remained in a state of nature open to the first occupant.

An ~~Estate~~ in DOWER is one which a wife acquires in her husbands inheritable property. Dower in by Cts. Ches. Law is one third of all the real property which the husband was seized ~~possessed~~ of during coverture. And this she holds in defiance of all creditors, or all acts of the husband.

By Com. the wife is entitled to one third of all the real estate that the husband did possess of; to the exclusion of the creditors. This estate cannot be devised from her. She is considered as a creditor of the highest rank. A gift in contemplation of Death is not good against her, for voluntary gifts are not good against creditors. Hence right of possession is considered as actual possession.

To enable the wife to that third of her husbands lands as dower, the estate must be such as her children could have inherited. If therefore the estate was limited to the heirs of his former wife, she can not be entitled to two thirds because her children could not have inherited it. Co Lit 30. (1)

The way that the limitation of an estate for life came about, when an estate was given to another without a limitation or the words heirs being added, is thus. At the time the rule was established no other than an estate for life could be conveyed; and in compliance to the rule that a fee was to be construed most strongly against the grantor, they decided such gifts to be estates for life. When it became so that a fee simple could be conveyed they [illegible] the same construction out of compliment to the possessors. Co Lit 27 b

In many instances in particular customs vary the rules of the Com. Law. There is one species of Dower which

(1) It is now settled, that although the husband may be tenant by the Courtesy of a trust estate of inheritance, the wife is not entitled to dower out of such an estate. 3 P Wms 229 The reason assigned why the wife has no dower out of a trust estate is that she was not endowed of a use at Com Law.

And from an adopt to trusts it has been determined, that a wife shall not be endowed of an equity of redemption, where the estate was wholly paid in fee by the husband previous to the marriage 1 Bro 326.

(1) There was a decision in Con 20 or 30 years ago. That when the issue was of age, the husband should give up the estate to them.

A Tenant by courtesy of gavelkind lands has only a moiety of the wife's estate, which he loses by a second marriage. Robin Gavelk 2 c 1.

(2) And by whom he has issue born alive which was capable of succeeding to them.

The issue in this case will be heir to the land tho' not heir to the mother; but he will inherit them by an immediate descent from the person last seised - ie when the wife was not seised.

(3) An agreement to a jointure in bar of Dower & a Distribution share of the Husbands personal property, is as binding upon the woman before she is of age as after. Drury v Drury 2 Ro P C 570.

(4) A jointure is not forfeited by the elopement of the wife with an adulterer, as a dower is. Cox's P Wms 227.

prevails in Gavelkind Tenure where the wife is entitled for life to one half of the husbands lands.

If a husband makes a Devise in Lieu of her Dower it is optional with her whether she will take it or not. Co Lit 36.

A Jointure before marriage be made a woman of her Dower, if it possesses certain requisites, is good and therewith is made after marriage it is entirely optional with her whether she will accept it or not. (3)

The requisites of a Jointure are; That it be a settlement on Land. either fee simple, fee tail, or for life; and it must commence immediately upon the Death of the husband. It must be a competent settlement. The competency however will depend entirely upon the circumstances of the husband. Altho' it was incompetent at the time it was made, yet if it was competent at the time of the husbands death, it is a good Jointure. (4) Eloping with an Adulterer also bars Dower. 3 Pill 10, 1 Pow

A Dower equivalent to as good in kind as the estate she parted with.

A Freehold estate is one for the life of the husband in all the wifes lands, of which she was actually seised during coverture. (2) Being seised in Law is sufficient to entitle to Dower.

To be entitled to it, she must have had issue capable of inheriting it; that is they must have been born alive. 5 Co 10, 30

In Con we have no Act altering the Statute relative to Dower, but we have uniformly acted upon the principles of the Common Law. (1)

Where the Doctrine of Joint Tenancy prevails there can be no such thing as a Dower or Curtesy estate in them. In Con we have by Act abolished Joint Tenancies. Nor are they allowed in New York unless it is expressed to be such an Estate.

When there is a contract as to repairs, cutting trees &c the parties will be governed by it in Tenancies for life.

When there is no Contract, it is the duty of the Tenant to make necessary repairs. He has also the right of cutting a quantum sufficit of timber ~~&c~~ for fire wood, for repairs & for the carrying on of husbandry.

This applies as well to estates for life by operation of law as to estates by contract.

If the tenant should cut more than sufficient for the above purposes it is waste.

In Eng a Tenant for life undertakes to convey a fee when he perfects his estate. This was a rule of policy, intending to prevent a confusion of Titles, as would have been the case before it became customary to convey by deed. — As the reason of this rule has ceased he thinks it not applicable to us.

When an estate is given to one man for life & to his heirs, it is a fee simple; if to the heirs of his body it is an estate Tail. The word "Heirs" in the first instance, no more than in every other conveyance, does not mean children, but a fee simple. Thus the

it is universally agreed, that when an estate is given to one person for life, & the word heirs is also included in the same instrument, that it means a fee simple. But whether a fee is conveyed by these words, when there are others in the same instrument that indicate an intention only to convey a life estate to the grantee, is a question that has given rise to much contention. —— Those who are of opinion that a fee passes even in this instance, say — That there can be no such estate — that the word "heirs" does not in law mean any particular person; but if the person contemplated as heir were defined, then he would take. They likewise say that no person can take in quality of heir by force of the instrument that conveys the property ~~to the grantee~~, but by succeeding to the grantee. The Court of Kings Bench have decided that the grantee should take according to the intention. This decision was reversed in the House of Lords in the presence of the twelve Judges by the casting vote of the Chancellor. Dyson Cases volume — Perrin vs Blake.

The fee hold of an estate can never be in abeyance; it can never be conveyed in future; it must pass instanti. This rule does not mean that a fee hold cannot be limited upon a fee hold. —

In law this rule is altered by Stat; this Stat allows it to be given to any person in being in future, as to the immediate descendant of any person in being.

In by the law allows fee holds to commence in future by will. Such an estate is called an executory devise.

Of Estates for years.

An Estate for years is one which has a determinate period, for its duration.

This estate may commence in future.

In Eng there is a Stat enacted in the reign of Hen 8th which allows a tenant in tail to lease for one ~~&~~ twenty years.

Of Estates at Will.

Such an estate is only a license for another person to enter, and improve the land during the pleasure of the owner.

This estate may be ended by either party.

Any act in the lessee which is wholly inconsistent with the lessor's estate is a termination of it. As the putting in a new tenant; or ploughing land which the tenant had occupied.

The lessor & lessee have both rights upon the termination of the estate.

If the lessor terminates the estate, the lessee has a right to the emblements, which ~~reaps~~ ~~reaps~~ ~~reaps~~ reaps for the purpose of carrying them away. If the lessor should intermeddle with them it would be trespass.

(1) If the lessee after staying past the usual time of letting land determins the estate he shall pay for a years rent, —

Altho the lessor has a right to terminate the estate at pleasure, yet he cannot exclude the tenant by force & arms; he must have recourse to a suit for trespass. (1)

When the lessor has only a life estate, the lease will be construed to mean an estate during his life, altho in case he had a larger one it extends to during the life of the lessee.

Emblements.

If a tenant for life dies, his executor has the right to the emblements.

If a tenant for years dies, he will not have the privilege of reaping after the expiration of his lease; for it was his own folly so to do under such circumstances.

If the lessee at will is turned out he has the right to the emblements. But if he terminates it he loses ~~them~~ them.

If a ~~wid~~ woman holds during widowhood, marries she forfeits the emblements. But the lessee does not.

So in all cases when the termination of the estate is by the act of the tenant he forfeits the ~~estate~~ emblements; when it is by the act of the lessor he does not.

By emblements is meant the annual produce of a mans labour. Grass is not therefore called emblements for that is not the annual production of a mans labour; nor is fruit.

Whatever adheres to the land is called real property. But the doctrine of emblements varies in some respects from what regulates real property in general.

Emblements are sometimes considered as real & sometimes as personal property.

When land is conveyed by deed they are considered as real & pass; when by will they are personal, unless it is in immediate contemplation of death.

When taking of them would be considered a crime they are personal; as is the case when they are reaped.

For Years & Sufferance. See preceding page.

No estate but at Will can be created in ~~estates~~ lands but by writing, in Con. —

Altho a verbal lease for years is void, yet the lessee is not liable as a trespasser for entering under it.

In Eng. verbal leases for three years are good, provided the rent reserved be two thirds of the improved value. [illegible] Comments as well. 2 Mod 250; 1 Lev 310 Pudys 3 Co 87 73. Co 47. 65

It has got to be a general received opinion that a lease for one year is good in Con without being in writing. But this is erroneous. The error arose from a misconstruction of a Stat ~~Introduced~~ previous to the one requiring them all to be in writing. This Stat enacted that all leases for more than one year should be considered as void unless they were reduced. But this Stat takes no notice of the former one. They consequently both remain in force. Altho not

— Therefore are void unless in writing, and all for more than one year are void unless recorded.

(8) An estate at Sufferance is the estate which a man holds after the expiration of his lease, by the tacit consent of the Landlord.

If the Landlord invades the tenant at Sufferance's rights, he is liable as a trespasser.

Estates may be given in the fee simple to commence in futuro upon conditions; and so also in the fee simple to expire upon condition. See contingent remainders. 1 Mod 100.

6 Geo 3 ch 77. Term for 999 years are considered as real property.

1 Dower is allowed out of them contrary to the Eng Law.

Tenants for yrs can prevent the reversioner from suing for trespass in waste, possession being what will enable the Tenant to this action. But if the Tenant makes no objection the action will lie at not lying in the Def's mouth to make that objection. This is founded upon a Stat to Glo. Plow 142. 2 Wms 203.

Of Mortgages

These originated thro' the insufficiency of the personal security of men to answer their debts.

Mortgages are conveyances ~~in fee~~, defeasible upon the (2) payment of money in a specified time, otherwise the Law vests it become the Mortgagees absolutely. Chancery has however interposed to prevent the absolute forfeiture of the estate upon non payment, allowing an equity of redemption. This interposition of Chancery originated thro' the abuse that arose under the Common Law regulation.

An Equity of Redemption is the equitable right which Chancery requires in the Mortgagor to redeem after the day of payment has expired.

The Equity of redemption is as much answerable for debts as the mortgaged premises.

Before Ch will allow the redemption of property, they will require the parties to do complete Justice. They will oblige the Mortgagor to allow for all reasonable improvements.

If the mortgagor is suffered to continue in possession he is ~~called~~ as a tenant at will. But he is not answerable for rent.

(1) If the Mortgagee gets possession he is liable to the Mortgagor for all the rents & profits at the settlement; whether it is made at the day of payment or not. 11 Co. 51.

The mortgagor can stop the Mortgagee committing waste by application to Chancery. The mortgagee is therefore answerable for the premises to ~~[illegible]~~ not for damages done. But if the land is a defective security he may commit waste. The Mortgagor may also be stopped from committing waste by application to Chancery. Hardwick 499. to Lit 205. 2 Vern 186. 516. Co 1. 1 Ro Ab 63. Prec 252. 705. 1 Ver 303. 2 Black 157. 2 Vent 355. 365.

(1) Their rights are the same as the tenant at will, only they are not liable for rent, & their emblements are not protected from a sudden termination of the estate by the mortgagee. See Doug 266 Cowtha

(2) A mortgage is the thing pledged, tho' it is often taken for the mortgage deed.

The condition to a mortgage is called the defeasance.

It is a legal maxim that what is once a mortgage is always a mortgage. No act of the mortgagor, no provision in the instrument will make it otherwise, and this is true even if it is a part of the contract not to improve the equity of redemption. Even when an absolute deed was delivered to a third person to be given up to the creditor upon the event of the debtor not paying, still Chancery considered it as a mortgage. 2 Ch Cases.

The mortgagee has a right to consider the mortgagor tenant either as a trespasser or as his tenant.

If the mortgagor shall pay over rents to the mortgagee before notice he would not be answerable over. 1 Ch Ca. 20. 160. 2 Ch Ca 87. Mortgagor may sell the equity of redemption either to the mortgagee, or to any other person. But if the sale was included in the same instrument with the mortgage the sale would be void. 1 Vern 268. 1 Bro P C 85 Ing. 2 Vern 488. 2 Ch Cas.

Subsequent mortgagees have no control over the premises till they have paid up the first.

If the third mortgagee did not know of the second at the time of the mortgage, he may purchase the first mort. & thereby gain a precedence to the second for all his demands. For when a man has the legal title & an equitable one equal to another person, the law will not allow the property to be taken from him till his demand is satisfied. 2 Vern 156. 1 Ch Ca 49. 1 Vern 290.

Mortgages have all the forms of real property. The mortgagee has the legal title & it descends to the heir. Yet they are in fact personal. They will pass by will without being signed by their witnesses. The passing to the heir is merely form. For if the mortgagee redeems the money is paid to the Ex, and the heir must give the deed. If the mortgagor never redeems, the Ex can compel the heir to convey; — If in this case the heir will pay the bond of the debt, he may retain the land. If mortgagee were real property the widow would be entitled to dower; but she is not. It may here be asked how it happens that the heir can bring ejectment as if ~~he had a right if he in fact had seen~~ the legal was real if it was only personal. This action is necessary in order to gain possession. Vern 302. 2 Ch Ca 187. 2 Vern 641. 5 Ch Ca 157. 2 Ch Ca 150. 187.

The mortgagee can sue upon the bond & ejectment at the same time. But a recovery on ~~one bar~~ the bond bars the action of Ejectment by Stat 4 Ann c 16. 7 Ann c 19. At Com Law he can go on & recover, but Ch will compel him to recovery.

A Mortgage retains its nature in whatever hands it passes, and a petition may be brought against any holder to redeem. Provided the condition appeared on the conveyance. [illegible]

If the money is not paid in the limited time, the mortgagee may petition the Court of Chancery to foreclose. A foreclosure gives the mortgagee an absolute right in the property both at Law & Equity.

When the mortgage condition is annexed to the instrument of conveyance, a petition on the equity of redemption may be brought against the purchasers. But when the condition does not appear on the mortgage the petition must be brought against the mortgagee. Even in the former case the Court will order the mortgagee to convey & will fix a penalty upon him if he does not.

There is such a thing as the mortgagee being barred of the right to redeem notwithstanding the maxim that "once a mortgage is always a mortgage." This happens when there has been a lapse of twenty years indisputable possession in the mortgagee. But this presumption may be rebutted.

A mortgage may either be made of the fee or of a term of years. In the first case it nominally descends to the heir, in the other to the executor both nominally & specifically.

The payment of the money, or a tender, revests the title to the land. If the mortgagee should bring an action of ejectment, this would operate as a bar. The mortgagee has effectually destroyed the rights of the mortgagee, as a bond is destroyed by payment. Co Lit 208. 2 Atk Ca 157. 6 Co 127. 191.

The title in the above case commonly depends upon parol testimony, & it rests upon the payment of the money. But this proof is precarious. If the mortgagee is in possession so that the mortgagor can bring an action of ejectment, or the mortgagor brings the same against the mortgagee, he then can give permanency to his title.

If neither of these methods are taken advantage of, application may be made to Chancery to order a reconveyance of the title, who will annex a penalty to their decree. If the mortgagee is without property & despite the penalties, he will lapse a decree quieting the mortgagor in possession.

Yet the effect of a tender is to discharge the lien upon the lands yet the debt or duty remains.

If the mortgage is gratuitous, or made merely for the purpose of making a settlement, and a tender is made no debt or duty remains and consequently the mortgagee cannot recover. 9 Co 77. Co Lit 207. 1 Ch Ca 99. 1 Vern 361. 1 Vern 575. 2 Atk 495. 1 Ch Ca 192. 1 Atk 520. 13 Ves 208. This relates to all the preceding rules.

Chancery interposes in allowing equities of redemption was on the ground of the contract made being opposed to sound policy. The same doctrine [illegible] that the Court 1 Vern 475. 9 Mod 196. assumed [illegible] of the equity of redemption.

(1) Neither can other persons besides the mortgagor who have a right to redeem, bind themselves by an agreement not to redeem. 1 Ves 138.

(2) If the mortgagor sells, mortgages the equity of redemption to the mortgagee, upon condition of refunding the terms of the agreement must be literally performed. 1 Vern 268.
1 Bro P C 149.

If a bond is given by the Mortgagor to the Mortgagee, covenanted to pay all the covenants in the Mortgage deed, non payment is considered a breach of the Mortgage deed. To this rule there are contrary authorities, & courts apprehend they are founded in reason.
2 Levinz 116. 3 Rolle 87. 6 J 281. Feb 206.

1 Vern 268.
1 Bro P C 149.

No argument restrictive of the redeemable quality of a Mortgage can be made. 2 Atk. 495. 1 Vern 192. 1 Vern 488. 138.

(1) A Mortgagor may however bind himself to let the mortgagee have the equity, if he will give as much as any other person.

So the rule that no restriction can be laid upon the redeemable quality of a mortgage then is one exception. Where the mortgage was made for the benefit of the Lender by way of a family agreement. If an old Bachelor expressed his brother to lend him £100; for security he made a mortgage, at the same time informed his brother that it was most probable he should never marry in which case he might hold land. The old bachelor died; and his other brothers brought a petition to be permitted to redeem. The courts and interpreters proved that it was a family arrangement. Petitioners dismissed. 1 Vern 192. 214. 232: 2 Vent 364.

A Conveyance to take Mortgage must have a defeasible condition — but can there be a Mortgage with a parol condition? You cannot prove the terms of any such parol condition; for this would violate the Stat of frauds & perjuries. If a parol condition can be proved otherwise than by the terms of the agreement, as by circumstances, it will be enforced. As was the case where the Mortgagor admitted it in his defence. — And so also where the Mortgagor remained in possession, and paid no rent, and the Mortgagee kept the rents & the Mortgagor paid interest upon it; and the mortgagee also hired a lot of the Mortgagor. These circumstances were sufficient to compel the Court to believe that the conveyance was an absolute one on the face of it, tho in fact a Mortgage. — So altho you cannot prove the terms of the parol condition, yet you may prove circumstances from which it may be inferred. — There has been by a long succession of decisions on this point. — In Conn it has been decided one way by the Superior Court, viz that circumstances can be proved to the condition from — and another way by the Supreme Court of Errors who reversed the decision. — Powell in his Law of Mortgages asserts that circumstances may be proved. And so does Hardesson in his Lectures. In Pl. Ch 526 The Chancellor has the same opinion. And so does Lord Hardwicke in Atkins Reports. Talt Cases 61. — The case that was decided in Conn was Hathburn vs Sanford. 2 Day 208.

The Mortgagee lessee is not entitled to emblements. Powell 73.

An Equity of Redemption is real property & as such descends to the heir. It may however be conveyed in fee, in tail or like other real property.

Equity of Redemption passes in a will under the description of lands. It may itself be mortgaged, or in other words the same lands may be repeatedly mortgaged.

(2) When the same lands are repeatedly mortgaged, a

subsequent

Mortgagee may redeem of the first. And tho' the first
Cest of several Mortgagees should redeem the acquirers by their
act no right prior to any of the intermediate Mortgagees,
unless the latter Mortgagee was ignorant at the time
of the Mortgage of the existence of any intermediate
Mortgage; in which case he may lock his Mortgage
to the one he purchased, & compel the intermediate
Mortgagees to redeem both before they can obtain the
land in satisfaction of their own. Pow. 228. 2 Vern 156.
Vern 49. Ver 678.

Any other persons interested may redeem; as a
creditor of the mortgagee; his wife if married after the
Mortgage made; his heir &c & whoever does redeem
acquires the legal title, & is right prior to the other
claimants. Pow 151. 152. 321. 334.

The Cestui of the mortgagee, tho' liable to be treated
as a trespasser, may redeem, & then rest the legal
title in himself. In this case however his lease is
not merged, but he still holds as before. By this
he secures himself against eviction. And if there be a
redemption of the lands it must be upon him.

Lapse of time alone will not make the estate
in the Mortgagee. But if the Mortgagee has for
twenty years treated the estate as if he were the absolute
owner & not the mortgagee, he will be considered
as absolute.

An Equity of redemption on mortgage in fee is assets
in Equity, tho not at law, & Chancery will decree a
sale of it for payment of Debts. Pow 124. 2 Vern 61.
2 Atk 294. 2 P Wm 341.

The foreclosure of an equity may be opened in
certain circumstances. Pow 693 &c

The effect of a foreclosure is to convey to the Mort-
gagee qualities of the estate as against those parties only who
were brought before the court on the application for a fore-
closure. And if after a foreclosure, a Mortgagee & Mort-
gagor enter into court when the application was made, & agree,
as the mortgagee &c may redeem of him.

In case of an inadequate or disproportion between the
value of the land, and the debt due to the mortgagee, a
foreclosure may be opened in favour of the mortgagor, or
other party I suppose, thro' error on the application. Otherwise
if ~~within~~ after foreclosure the Mortgagee has altered.
On a petition for opening a foreclosure Chancery will
calculate the rents & profits received by the
The Mortgagee is allowed a credit for reasonable improvements,
but is answerable for the improved value of the premises
increased at his expence — for this expence is allowed
him in his account. ~~Ca Ch 62~~ 2 Atk

(1) Formerly a mortgage deed was considered a condition precedent, but to considering totally confounds the distinction between a condition precedent & subsequent; which is applicable to the definition; for it is a condition to defeat a right which is already vested. Co Lit 205. a 206. a 210. a. 221. b 1 Co 22. Co Ch 427.

Co 4 659.

Co 4 66. Co Ch 303.
Pow 674. 72
1 Atk 606. 2 Ch 107.
3 Ch 214. 723.
Dong 21. 266. 610.

Page 316.

If the mortgagor can prove an express agreement that he should continue in possession for a fixed time after the day of payment, he is tenant for ~~payment~~ years, otherwise he is tenant at will. And even if there is an express agreement that he shall continue in possession, but for no fixed time, he is still tenant at will. (1)

It has been holden by the Circuit Court of N Jersey, that if after the mortgage made, the mortgagor be permitted to remain in possession; this furnishes presumption of an agreement that he shall continue in possession till the day of payment. A writ of error from this judgement is now pending before the Supreme Court of the United States.

The mortgagor in possession is tenant at will to many purposes; tho in many respects he differs from such a tenant. He may be sued in trespass by the mortgagee without notice as may also his lessee, notwithstanding he be ignorant of the mortgage ittsels. An ordinary tenant at will cannot make a lease of the least validity. But a mortgagor even after the day of payment may make a lease, of which tho it may be defeated by the mortgagee ipsealty, yet the mortgagor will have the final benefit. If the mortgagor be the right of the mortgagors lessee; tho ~~liable to be treated as a trespasser~~ he establishes the lease. The mortgagors lessee, tho liable to be treated as a trespasser himself may maintain trespass against a stranger. The lessee of a common tenant at will cannot.

The mortgagor has the first right of redemption, and he must have a reasonable time allowed to exercise this right, before any other can redeem. It is a rule of law, that a disseisee cannot recover mesne profits against the disseisor; tho against the disseisor himself he can. Yet the mortgagee after taking possession or giving notice of the otherwise, may recover against the lessee of the mortgagor, but in arrear, that is, incurred before notice as well as what accrues after. However the lessee is not obliged to pay over again what he paid to the lessor before notice.

Against the mortgagor himself the mortgagee cannot (I suppose) receive any mesne profits; because the former is not liable for rent, tho regarded as tenant.

Chancery will issue an injunction to stay waste, against the mortgagor in possession; tho against a tenant at will such an injunction is never granted.

A mortgagee in possession gains a settlement by virtue of his interest in the mortgaged lands; a mortgagee in possession gains no settlement. By Stat 7 Wm 3. the former requires in the same way a right to vote at elections &c; the latter does not.

1 Fee Rep. 60.

Pow. 454.

1 Fee 756.

Pow. M 6. 60 Lit
207. 209. 9 Kil 077.

Pow. M 11 - 2 Lu
116. 3 Kil 307.
79. 54. 712.
Long 401.

Pinty 231.

A Mortgagor defendant in ejectment cannot set up a title, in a third person against his mortgagee; nor can mortgagees lease against the Mortgagor.

Payment or tender of payment to the mortgagor in possession, before the day, entitles the mortgagor to an action of ejectment against the mortgagee: or if the mortgagee being ejectment against the mortgagor in possession, the plea of payment or tender is a good bar.

If the mortgagor in possession has paid, or made a tender, and the mortgagee the he does not sue, refuses to reconvey; Chancery will compel him, under a penalty to make a reconveyance. And if in this case the mortgagee being a bankrupt, should disregard the penalty; Chancery will grant the mortgagor in his possession. This is done because without such security; the mortgagor would depend on parole evidence.

Tender after the day of payment takes away the mortgagees right to ~~a conveyance~~ interest from the time of tender; But six months notice must be given by the mortgagor.

In ordinary cases, tender & refusal only take away the mortgagee claim to the land; ~~tendered~~ and he still retains his claim to the money tendered, as in other cases of tender. But in case of a voluntary mortgage, tender & refusal, not only destroy the Mortgagee's lien on the land &; But also discharges the mortgagor from all obligation to discharge his lands or other security, whatever it may be. For as the effect of the tender is a destruction of the lien & leaves the mortgagee no other remedy than that arising from a former debt or duty, and as in this case there was no precedent, debt, or duty whatever; the Mortgagee has no remedy left. When a mortgage is given, it is customary for the mortgagee to take a bond, or some other security, collateral to the Mortgage.

When the money is not paid nor tendered by the day fixed for payment the Mortgagee has, at law, an absolute property in both the land & collateral security; & he may pursue his remedy on the Mortgage & on the bond at the same time. A foreclosure however discharges the bond at law. That is (I suppose) if the Mortgagee avail himself of the foreclosure.

On the decree of foreclosure cost is allowed & put into the decree, & thus becomes a further lien on the land.

2 Vern 392. 562.
3 Atk 723.
Dow 94.

Dow 75.

Dettk 518.

Dow Atk 9. 2 Vesy 11.
2 Vern 11.

Dow Atk 95. 442

Dettk 5.0.
Dow Atk 95.

If any part of the debt how small, remains unpaid, the Mortgagee may foreclose or eject: nor can the Mortgagor, in case of ejectment, recover back what he had before paid: he must either redeem or lose what had been before paid. If however, after part pay ment, a foreclosure be obtained; the Mortgagor, Judge Nelson supposes is on principle entitled to recover what he has paid: since, in this case, he is supposed as foreclosed from redemption; & except in cases of extreme injustice actually is so.

Mortgagee after ejectment is liable to injunction against waste. And tho' the mortgagor does not apply for such injunction, yet on redemption, the mortgagee must account for waste committed. If the Estate Pledged be an insufficient security, Chancery will not grant an injunction.

The Mortgagor in some cases is liable to an injunction.

Reasonable improvements made by the Mortgagee in possession become principle & draw interest. So if he has been at expence in defending his title, (as he must defend it, if contested) what he has advanced in its defence becomes principle.

If the Mortgagor has a defective title or none at all, at the time of making the Mortgage, & afterwards procures one that is good, the mortgagee may avail himself of this subsequent title against the Mortgagor himself; because no man may impeach his own deed. But against strangers this subsequent title will not avail the Mortgagor.

If the Mortgagee in possession lose the profits, in consequence of the Mortgagors neglect; the latter must finally bear the loss.

If the Mortgagee in possession refuse to make necessary repairs; the Mortgagor may in Chancery compel him to make them; but at the ~~expence of the~~ expence of the Mortgagor according to powell on Mort 95.

It has become a question in this country, whether sales of land redeemable within a certain time, for taxes, are Mortgages or not. Such sales in the State of Vermont have been frequent. Judge Nelson supposes that they are strictly mortgages. If this opinion be just, the former owner, from whom the taxes were due, are entitled to their equity of redemption. The words of the Statute enacting, that unless they are redeemed in a certain

2 Atk. 495. 2 Ven 84

~~2 Ven 520.~~ Pow M
27.

2 Ven. 520.

Pow M 31. 2 Ven
364. 7 Ven 195.
7. 232.

1 Bro P.C. 149. 369.
Pow M 28. 119. 187.
1 Ven 262.
Talb Ca Cr.

time, the lands should be sold absolutely, vested in the purchasers, are the same as those used in the defeasance of a mortgage.

If after a mortgage given, the mortgagee by threatening to sue the mortgagor on his bond, and thus taking advantage of his situation, induces the latter to make him an absolute conveyance; Chancery will relieve the mortgagor against the grant.

A defeasance separate from the deed is good as between the mortgagor & mortgagee; but as to third persons it may be otherwise; because the deed purporting to be a conveyance of an absolute estate, may deceive honest men. If therefore, a mortgaged estate be purchased under these circumstances; the purchaser vests in the buyer an estate, not subject to mortgagors Equity of redemption. Yet even in this case, the mortgagee is compellable in Chancery to recovery, a penalty.

If the defeasance be connected with the deed; the Mortgagees assignee takes an interest subject to the Equity; and the mortgagor must redeem if at all, of the assignee.

An agreement that the mortgagee shall have the right of preemption is good.

An agreement, at the time of making the mortgage, that on payment of a sum, in addition to the debt, for which the estate is pledged, the mortgagee shall have an absolute property in the premises, is not good. To the maxim "once a mortgage always a mortgage" there are a few exceptions.

1st In case of family settlements

If an uncle give mortgage to his niece, redeemable "during his life" there can be no redemption after his death.

So an agreement between two brothers (Mortgagor & Mortgagee) that unless he there should be no redemption, is binding.

2d If after recovery in ejectment by the mortgagee, he purchase the equity of redemption, and at the same time, contract to recovery to the mortgagor, on payment of a certain sum by the latter within a limited time, this subsequent agreement does not raise any new equity in favour of the mortgagor. But the condition of payment must be strictly complied with by the mortgagor; or the property will be absolutely in the mortgagee.

9214

Bacon 90.
1 Ves K 756.

Prec Ch 112. 120.
313. 317.
P Ch 61. 65.
2 Vern 343.

Prec Ch 124. 125.
1 Vern 410. 1 Ch 354
3 P Wm 341.

1 Vern 101. 63. 69.
2 P Wm 412: 2 Ath 50.
1 Anderson 117.

If after the day of payment the mortgagor pay the mortgagee his demand; it is dubious whether the court of law may not give redress by compelling the other to reconvey. In the state of Newyork a court of law has afforded redress to a mortgagor in such a case.

Parole proof of the payment of the debt, for which a mortgage has been given, is good; unless the debt be secured by a specialty.

Direct parole testimony is not admitted to prove a defeasance agreed upon by the parties. But parole proof of a train of circumstantial facts, the existence of which is inconsistent with the estates being absolute in the grantee, will induce a Court of Chancery to consider the conveyance as a mortgage, tho it purport to be an absolute deed.

Qu. Is not such evidence in a court of Law? Yes.

The first right of redemption is in the mortgagor, and he must have a reasonable time to exercise this right, before any other can redeem.

After the mortgagors right of redemption, the wife, the heir, a subsequent mortgagee & any other person having a legal title may redeem.

If the mortgagor, his heir, or devisee redeem, the estate rests absolutely in him, & cannot be redeemed out of his hands (this must be when all the incumbrances are paid). But if a creditor or mortgagee redeem, the estate may be redeemed again, because he has not the whole title.

If the husband settle a Jointure on his wife in mortgaged property; she on his death, may redeem (and then her estate in the property is for life only; yet if on his death the heir claim the property settled on her for a jointure; he must pay her representatives two thirds of the redemption money advanced by her, or they will hold it in fee against him; unless the wife joined in encumbering it, the heir must pay the whole, that is when the jointure is older than the mortgage. This rule is founded on the reason, that the value of a life estate is equal to one third of an estate in fee.

The reversion, if any is legal assets, when expectant on a mortgage for years; & execution may go against them, to be levied [illegible] accidental; But if the term be all the interest the mortgagor has in the lands; the equity of redemption is only equitable assets.

Lands devised to trustees to pay debts "have always been equitable assets. If devised to Executors" for the same purpose they were formerly holden to be ~~equitable~~ legal assets; in both cases they are now holden to be equitable & not legal [illegible].

Sayk

Comyn 280. 711-708.
Powell 100. 296. 315.
356. Ch Ca 66.
2 Wilson 356.
5 Co 60.

Woodison
Powell 64. Fal Ca
64. 3 Atk 389.
Pr Ch 526.

2 Atk 54. 292. 662.
Stra 1107. Pr Ch 131. 407.
1 Vern 29. 244.
Powell 189. 2 Ver 207.
286. 446. 506. 511 &c
1 P Wms 776. 87. 2 Ver 663.
Powell 143. 511.

Powell 144. 145.
148. 214. 1 P Wms 775.
1 Vern 87. 2 Atk 58.
353. 3 Ch 556. 630.
Powell 229. 231.
Pr Ch 89.

If one make a voluntary conveyance either absolute or conditional, and afterwards aliene or mortgage for a valuable consideration, the subsequent aliene or mortgagee will by law, of lb 27. hold against the former, provided the subsequent aliene or he had no notice of the former conveyance: and if the first conveyance was fraudulent the latter purchaser will hold even, if he had notice.

When a deed, purporting to be absolute, is given in = stones, intended to be a mortgage it is considered as such on the ground of trust.

If there is an agreement to make a mortgage, or by fraud, accident, or mistake, an absolute deed is executed; Chancery (and Never Suppose, Courts of Law) will on proof of the agreement consider the conveyance as a mortgage; for this is not a parole defeasance, but parole agreement to make a written ~~agreement~~ defeasance. In all cases indeed, when a condition to a deed can be inferred without injuring the rules of law, such condition will be binding. This doctrine has been recognized by the Superior Court in this state, but discarded by the Supreme Court of Errors. Some who admit the doctrine just laid down, still contend that parole proof of such circumstances as amount to a demonstration of an intended condition, is not, as parole proof of any avail, nor are the circumstances offered of any legal efficacy, in themselves considered; but they contend, that such circumstances afford sufficient presumptive proof of a written condition, which by some means has been lost sed quere.

If the Mortgagor be indebted, to the mortgagee on any other account than that on which the mortgage was made; he shall not on a bill to redeem, have his equity of redemption, ~~unless~~ he pays the former, as well as the latter demand.

If however the other debts due to the mortgagee be also secured by mortgage, this rule does not hold unless the security for such other debts be defective. The first rule applies, in its full extent, only to the case of redemption by the mortgagor himself. If other persons interested redeem, the rule obtains under certain qualifications; which respect the nature of those demands of the mortgagee, which are not secured by mortgage h.f.

If when the mortgagee has other demands against the mortgagor than those secured by mortgage the heir or devisee of the latter would redeem; he is obliged to pay only such of those other debts, as are secured by specialty. If the estate mortgaged be a term for years; the executor on redemption must pay all the demands of the ~~executor~~ mortgagee, whether due by specialty or simple contract. If in the last case, the heir or executor has sold the equity of redemption, the aliene is

Pow M 236.

1 Pow M 136. 511
517.

2 Vent 393. Pow 141
3 Atk 518. 1 Ven 49.

3 Atk 518.

Fall C 63. Pow M.
135. 149 to 160.
1 P Wm 271.
2 Atk 333. 3 M 313
2 Vent 340. 3 P W 280
1 Ford 323.

bound to discharge on redemption, only the immediate lien created by the mortgage, and the heir or executor is personally liable for the other debts due to the mortgagee.

A subsequent mortgagee may redeem without paying even a specialty debt due from the mortgagor to the mortgagee; ~~provided he had no notice of otherwise~~ as to a judgment in the hands of the first mortgagee, provided he had no notice of the subsequent mortgage.

Prior creditors have a right to redeem before subsequent ones.

If one make a mortgage; in which he stipulates to pay the mortgagee "all his present & future demands" and he declares the estate mortgaged "liable for both" still a mortgagor creditor without notice notice may redeem without paying those debts which are subsequent to his own; tho he must pay those which are older than his. If he has no notice of the clause, he must pay those (I suppose) which are subsequent to his own. The rule (I suppose) would be the same if there was no such clause.

If a mortgagee petition for foreclosure, the proceeding rules, which provide for the payment of his debts not secured by mortgage do do not operate. They go only in cases of a petition for redemption.

If the heir of the mortgagor redeem at a small price; a subsequent mortgagee may redeem at the same price, unless the heir has a prior incumbrance of his own — same rule as a trustee; the heir may then, Judge Reeve's supposes, redeem of this subsequent mortgagee on paying the same price, together with his debt.

If the mortgagor petition for a redemption, when the principle & interest exceed the penalty of the bond, he must pay the whole, or lose the right of redemption.

If the mortgage contain no clause respecting future disbursements by mortgagee; a creditor may, I suppose, in all cases redeem, without paying demands of the mortgagee, subsequent to his own.

Length of possession by the mortgagee does not of itself ever amount to a bar of the mortgagor's right of redemption; for such a possession not being adverse to the mortgagor's claim, is not within the statute of limitations.

Yet the mortgagee possession after forfeiture for twenty years, will under some circumstances be a bar. If the mortgagor can prove that he has paid interest to the mortgagee within the 20 years; or that the mortgagee relinquishes the obligation for the debt; the mortgagee possession is no bar to ~~the debt~~ redemption.

1880

4 Fo. 300.

Pow. M160.

C. Ch. 447. 2 Vern. 61

2 Vent 348. 351.
1 Vern 170. 2 Ab 193. 367.
Pow M297 &c
Barnd 50.

1 Vern 271. Pow M305.

Pow M306. 2 Vern 581.
Pr Ch 181. 265.
Ins 969. Pow 307.

3 P Wms 217.

Pow 307.

Pow M496. 1 Vern.
45. 476.

Disabilities of the mortgagor as infancy &c will prevent the Statute from attaching so as to bar redemption.

If the Statute of Limitations has begun to run on the mortgage; an intervening disability does not save the bar arising from the Mortgagees possession.

When the Mortgagee remains in possession even after forfeiture, the Statute does not attach.

In case of a Welch Mortgage, that is one payable on a certain day in such a year, or on the same day in any subsequent year, the possession of the mortgagee for any length of time & unaccompanied by any such circumstance, as receiving of Interest by Mortgagee &c is no bar to redemption.

The Mortgagee's devisee takes the estate subject to the Mortgagor's equity.

The Estate of the mortgagee was formerly considered as personal property in Chancery only; it is now so considered at law also.

Tho it be expressly provided in the Mortgage that the Mortgagor may pay either the heir or executor of the Mortgagee; yet if payment be made to the heir, he as trustee to the Executor, is compellable to pay the money to the latter. Yes

If the Mortgagee sell; the heir & not the Ex of the vendee will be entitled to the vendees right; For the vendee is considered as having an absolute purpose to increase his property, and not as having taken by the conveyance of the Mortgage a new security for money lent, as was the case with the Mortgagee.

So if the Mortgagee devise; the heir & not the Executor of the devisee, will take on the death of the Testator, if it appear to have been his intention that the estate should prove as real. So if money secured by mortgage be directed to be laid out in land.

Among Joint Mortgagees there is no Jus Accrescendi except in the case of a mortgage taken by husband & wife.

A Mortgagee may, after foreclosure refuse to take possession of the mortgaged premises, & demand his original debt.

The general rule ~~is to~~ as to the Mortgagee's accounting for the profits, is that he answer for what profits he has, and not for what he might have had. This rule however does not obtain when the Mortgagee in possession has acted negligently or fraudulently: for in such a case, he is liable for the real annual value. Unavoidable losses fall on the mortgagee.

The Mortgagee in possession must make necessary repairs, or lose the value of the profits, which a prudent & honest man would have made from the land.

If the mortgagee lease, he is answerable for the rent. If he lease for a rent unreasonably low, he is answerable for the real value.

If the mortgagee in possession be obliged by his situation & circumstances, to employ a bailiff to take care of the mortgaged property; he shall have a reasonable allowance from the mortgagor for the payment of the bailiff. But tho' there be an express stipulation that the mortgagor shall be at the expense of paying a bailiff to be employed by the mortgagee; still unless the mortgagee actually employs one, the mortgagee is not holden to make any allowance on that account; and if the agreement be that the mortgagee shall pay the mortgagee for his own trouble in receiving the profits, the agreement will not be allowed.

If the mortgagee sell his interest in the estate; he is not liable to account for the profits, unless the purchaser is insolvent, or unable to act.

If the mortgagee in possession manage in a careless or wanton injure the freehold; he is not liable to an action of waste tho' he is to an injunction against waste; as he is to account for the real annual value of the land.

It is a general rule that the mortgagee shall recover the mortgagee, for doing that which the mortgagee might reasonably complain of the mortgagee for not doing. The Chancellor has been allowed the expense of a decent building.

Of Accounting

If when there is no subsequent incumbrance, mortgagee to take a part of the profits, the mortgagee the other part; the mortgagee is only to account for what he receives.

But if in this case, there be a subsequent incumbrance, the mortgagee in possession must account with him for the whole profits, that is, first the mortgagee must compute the whole profits as credit to stand against his debt, but the mortgagee, in this case still is the mortgagee, what the actual receipt of profits by the latter has not paid.

The second rule there is this exception; if the first mortgagee had no notice of the subsequent incumbrance; he will not be obliged to account for more of the profits than he has received.

Ew 469. 3 Bac 058.
Itrum 267.

Dorg 21.

1 Dun 258.

2 Alk 353. 553.

If a subsequent mortgagee sue a mortgagor in possession, in an action of ejectment; the mortgagor cannot deny the plaintiffs title on the ground of a prior mortgage. But if the first mortgagee will lend the defendant his title deeds, the latter may defeat the plaintiffs action. In this case however, the first mortgagee, as he is instrumental in keeping the subsequent incumbrance out of possession must account with the latter, on redemption by him, for the whole profits received, even tho' he had none.

Mortgagee may for proper cause, sue his own lessee in ejectment, but the mortgagee may by intervening, defeat his action.

If the mortgagee recover judgement in ejectment against the mortgagor's lessee; the lessee's liability to the mortgagee for future rents, ceases at an end.

If then the mortgagee permit the lessee to remain in possession; the mortgagee has his remedy for rent against the mortgagee himself.

If the mortgagee petition for redemption after assignment by the mortgagee; the mortgagee is not made a party to the bill, unless he has been in possession.

When a subsequent mortgagee, redeems of the first mortgagee, if the latter can produce a settlement between himself & the mortgagor, the subsequent mortgagee must allow the ballance struck, & pay it to the mortgagee. Such settlement being binding upon the redeeming mortgagee, unless he can impeach it of fraud; and if the mortgagee afterwards redeems, he must allow the same account to the mortgagee who redeemed.

Annual Rents are the application of the surplus of the annual profits, on the settlement, to the principal. This mode of accounting is much the most advantageous to the mortgagor; he is always entitled to compute in this way, when there is a considerable surplus of annual profits, over the amount of the interest.

The other mode of accounting is ~~upon principle~~ effected by bringing all the profits into one aggregate sum on settlement & by computing the interest for the whole time, on the whole original principal.

Pow 307. 1 Mr 66
368. 2 Mar 365.
2 Mary 258. 4 Ath
310.

9 Ath 344. Dory
401.

Pow 1 Ath 65 21.
4 Mar 66.

Pow 109. 480.

Pow 481.

20 Pow 296. 2. 8.
2 Mar 370. 663. 188.
Dor. 2 Mary Eas 175.

20 Pow 23 Ath 185.
2 Mar 390: 20 Ath 352.
Pow 385 & 20 Ath 296.

Of Foreclosure

When the Estate mortgaged amounts to much more than the debt due, Chancery will commonly allow the mortgagor on petition to redeem, a reasonable time.

One of two joint mortgagees cannot without the ~~consent~~ other assign a private sum, nor is there any survivorship between them. On a petition for foreclosure the mortgagor cannot impeach the mortgagee's title.

The mortgagee may pursue his remedy on the mortgage & bond at the same time. But if he recovers his money on the bond, he cannot afterwards pursue another remedy. Yet if he recovers ~~on the bond~~ on petition for a foreclosure, yet if he recovers on the bond, or petition for a judgment he may still sue on the bond, or petition for foreclosure: For after recovery in judgment he still holds as mortgagee. After obtaining judgment on the bond, the mortgagee may take the land mortgaged, in execution as in other cases of debt. Qu. If the mortgagee has recovered judgment & not his money can he pursue other ~~money~~ remedies? I suppose he can. For in case of a stand, one remedy without payment, is no bar to another action. A judgment

The Executor of the Mortgagee may prevent the heir from foreclosing; but if the heir do foreclose, the foreclosure is good. In this case however he must pay the debt to the Executor or the executor can compel him to convey the land to him.

Qu. Can the Executor compel him to reconvey, if he pay the money? no.

(Heir) chose to pay the money? no.

After the death of the mortgagee a receiver be committed on the mortgaged lands, the Executor cannot sue, but the heir can.

If the heir will not sue; there appears to be no remedy for the Executor unless perhaps Chancery would compel the heir, on a bond of indemnity given him, to lend his name to the Executor.

The time limited for redeeming is computed by calendar months.

If the mortgagee does not make the subsequent incumbrancers parties to the Bill for foreclosure, the decree, as against them, is not binding; this seems to be the rule, whether the first mortgagee had notice of the subsequent incumbrances, or not.

If an infant mortgagor be foreclosed: he is to have a day in court, after he obtains full age, to make objections to the foreclosure. He allowed him for this purpose is

XXX.

Pow 118. 3 Pl 252.
2 Deut 415. 2 Pl 333.

Gr Mod 1.158. Pow 491.
2 Pf Gr Pl 600.

Pow 491. Ed 627.

Pow 465. & Mem 1.5.
2 Deut 235.

Pow 495. Pf Gr Pl
Ord. 3
Lu 2 Pro Gl (ei) 125.

Pow Pl 183. &c
Deut 701.
1 Pend 152. 5.

Six months, within which time he must be appointed to offer his objections. If then he can shew any error in the proceedings, or any facts, which prove fraud or injustice he may avoid the foreclosure but otherwise. If then can be shewn no error, illegalness or fraud, the infant loses his equity of redemption, unless the foreclosure redeems.

If a feme sole, or her ancestor, mortgages & the ~~[illegible]~~ she marries; she has no day in court at the close of her coverture, to make objections to a foreclosure obtained during the coverture.

If the mortgagor becomes a bankrupt, the mortgagee foreclosures to deprive the creditors; they may open the foreclosure. So if he has foreclosed after the creditors have opposed to pay his demands.

There is no instance in which a foreclosure has been opened, in favour of one claiming under a mere voluntary conveyance, as devisee &c.

When the mortgagee after foreclosure devises the mortgaged estate to the mortgagor, it does decide that a subsequent mortgagee, who had been made a party to the bill for foreclosure, has thus lost his equity, nor shall still redeem from the mortgagor; or that very act of the estate coming again into the mortgagor's hands, revived the mortgagee's equity. It is laid down in general terms that foreclosure discharges the mortgagor; but this position is not true unless the mortgagee takes possession.

If he does not take possession, he may still, even after foreclosure, shew on the bond, & the bringing of this still puts an end to the foreclosure. If he has taken possession, the foreclosure may be pleaded in bar of an action on the bond &c.

Chancery will always open a foreclosure obtained by fraudulent means, or misrepresentation &c.

It is not certain many to foreclose a mortgage were seven or ten years; the common practice is to appeal to chancery for a decree to sell the reversion &c. Such mortgaged property may however, like any other, be foreclosed; & a decree to sell, is seldom granted in cases of reversion, unless the determination of the particular estate is considerably distant.

A prior mortgagee is sometimes postponed to a subsequent incumbrancer; this happens when the latter has formerly has been guilty of neglect. When the latter has purchased a former incumbrance. The preference given to the ~~former~~ incumbrancer, in the former case,

2 Vern 554.

2 Mk 49. 1 Vern 370.

1 Pym 193. Ver 186. 1 Ver 6. 1 Bro Ch 357.

3 Pym 280. 1 Ver 360. 1 Ze R 763. 2 Vent 337.

1 Ze R 776. 1 Vent 310. Pow M 149. 195. 214. 228. 231. 2 Mk 53. 353. 1 Do 232. Ch Ca 35. 201. 1 Ver 187. 1 Ves 573.

Stra 240. 1 Vent 337. 1 Ze 755. 763.

Pow M 214 Ge 1 Vern 187. 2 Do 279.

1 Ze R 786 ag.t

Pow 215. 1 Vern 52. 2 Vern 159.

Pow 232. 2 Vern 234. 1 Pin Wms 340.

1 Vern 375. 774.

is founded principally, on the rule of equity, that it is the duty of a prior mortgagee, when he knows that another person is about to advance money on the security of the land, already mortgaged to himself to give such person notice of his lien — This however he is not obliged to do, unless he has a convenient opportunity.

But if having such an opportunity he fail to give notice; the claim of the subsequent mortgagee shall be preferred to his.

It is holden by the Lord Chancellor in a case in P. Wms reports "That if a prior mortgagee be a witness to a subsequent mortgage, & do not give notice of his own lien; the subsequent mortgagee shall in all such cases be preferred; unless it be proved that the witness was ignorant of the contents: Because the witness is presumed to know the contents of the instrument which he attests — This position is contended by Lord Hardwicke & therefore.

There is another species of negligence, which will postpone a prior, to a subsequent mortgagee; as if the mortgagee permit the title Deeds to remain in the hands of the mortgagor; by means of which the mortgagor imposes on subsequent mortgagees.

When there is equal equity, he who has the legal title, shall be preferred; as if the third mortgagee for a valuable consideration redeems of the first, in this case, the third shall be postponed to the second, unless at the time of lending his money he knew of the second incumbrance.

If he knew at the time of lending his money that there was an intermediate mortgagee; he has not equal equity, & therefore shall not take his own, to the first mortgagees claim; yet in this case the third mortgagee shall be reimbursed what he paid to the first on redeeming.

A subsequent incumbrancer, may obtain a preference to the intermediate mortgagee's by purchasing the legal title from the first mortgagee, even tho the claim of the first mortgagee has been satisfied by payment after the day fixed, I suppose.

If a subsequent mortgagee procure the title by fraud of the first to mortgagee, he may avail himself of it against intermediate incumbrancers, & take his own to it.

Quod minus

If a subsequent mortgagee purchase a foreign incumbrance which is defective in some of its requisites; it will not avail him against intermediate incumbrancers. The doctrine of tacking does not take place, unless the prior incumbrance, purchased in, carries the legal estate

Pow 236. 7 Vin.
Ab 52. pl 3
1 Vent 108. 319.
2 Vent 339. 1 Ves
69. 2 Do 574. Pow
257. 285: 1 Ch Ca
291.

Talb Ca 65.

Pow 711. 1 Ves 64

2 Atk 2[illegible].

Pow 368. 377
1 Atk 487. Bro Ch
477. 61. 2 Salk 449.
Talb Ca 154. 1 Bro
P.C. Ca 11. 101.

Pow 370. 376. 378.
385. 1 Vent 349.
3 Bro Pt Ca 290.
1 Lev 203.
2 P Wms 353. 3 Do
358. 1 Vez 693.
Bro Ch 477. 1 Atk
487. Talb 53.

+ Pow 378

Pow 302. 3.

Bro Ch 101.
Pow 400

Estates upon Condition

A fourth Mortgagee by purchasing the second obtains no priority to the third.

A Clause in a mortgage, "that the premises shall be liable for any future disbursement", will affect such subsequent Mortgagees as have notice at the time of lending; & such only. In the registering Counties in England, actual notice in such cases, has been holden to be necessary.

If the mortgagor commit an act of bankruptcy, and a Mortgagee not knowing it, purchases the equity of redemption; the purchase is valid.

A Judgement binds the lands of the debtor. But a subsequent Mortgagee may by purchase the first incumbrance, hold against an intermediate Judgement. This I presume would not be the case if the subsequent Mortgagee knew of the intermediate Judgement at the time of lending his money.

On principle, a subsequent mortgagee ought not to be allowed to tack to the prejudice of intermediate incumbrances; because by means of the Public Records, he may, in all cases, obtain notice of the intermediate Liens.

On the death of the Mortgagor, his heir may recover out of the personal estate of the mortgagor; yet his claim, to the personal estate for this purpose, is post poned to that of creditors & general, the not of residuary legatees. The last rule applies as well to devises as to the heir of the mortgagor, unless a contrary intention can be collected from the Devise & circumstances:

If one devise an equity of redemption to A, and to B. & one devise all his personal property, except what it may be necessary for the payment of debts, to B in specific legacies; the Devisee A, shall take cum onere; Because from such a disposition of his property the devisor is supposed to have intended, that the devisee should not have the aid of the personal property to redeem. Yet if in this case, the personal property had been bequeathed in pecuniary or general gift legacies; the Devisee might claim it to exonerate the mortgaged lands. He being a specific Devisee.

But a specific devisee of property not mortgaged is entitled to the aid of the personal fund against the legatees, unless their bequests are also specific.

The heir of the assignee of an equity of redemption has no claim on the personal fund of the assignee, to enable himself to redeem. For the personal estate of the assignee is not increased but diminished by the purchase of the equity.—

1024.

Dow 439.

Pr Ch 160. 3 Atk
520: 2 Vern 134.
3 Bro 1374.
Dow 422.

1 Vern 194. 1 Vern
1364. Salk 449.
2 Atk 331. 1 P Wms
652. Dow 439.
441. 442. 460.

1 Vern 169: 2 Ab 125.
3 Atk 271: 3 Ch Rep
78. Dow 426.
Ly Ca Ab 329. 1.

1 P W 458. 478. 652.
Pr Ch 500. 2 Vern 392
1 Bro P Ca 447.
2 Ab 56. Dow 430.
432. 3 Atk 722.

4 Bro P Ca 447
Dow 434. 48. a
Ca Ld 315.
1 Ly Ca Ab 287. 1.

Pr Ch 62.
1 Ves 48. 268. 480.
Dow P 121. 442
Gilb Rep Ly 69.

3 If on settlement between the mortgagee & mortgagor, compound interest has been ~~allowed~~ computed, Chancery will not relieve against it, unless there is some evidence express, or presumptive, that the mortgagor was constrained by fear or oppression to give his assent to such computation.

If the agreement be to pay 5 per Cent interest, with condition that if the payment be not punctually made, 6 per Cent shall be paid; the condition, tho not usurious is void; but a covenant to pay the additional one per Cent is binding; If the agreement be to pay 6 per Cent, with condition, that if the payments be punctually made, 5 shall be received; the condition is good: but the large premium in these cases must not exceed the legal interest, if it be on a contract for a loan; if it does, the agreement is usurious.

2d. If the Contract be not for a loan, the increased premium may in certain cases exceed legal interest.

A written agreement subsequent to the mortgage, to pay interest on the lawful interest, is good, if the transaction be fair & unattended with any circumstances of oppression. But the mere statement of an account signed by the mortgagor does not carry interest on interest.

If on settlement without any intermediate agreement, compound interest be computed; Chancery will relieve against it. Quere. If the mortgagee assign with the approbation of the mortgagor, the assignee will be entitled to interest on the interest which accrued at the time of the assignment; but not on that, which afterwards accrued; This rule does not hold unless the assignment be bona fide, & with the consent of the mortgagor.

The whole sum which is computed by a master in Chancery, on a bill to redeem a foreclosure, carries interest from the time of the confirmation of the Masters report. This rule does not hold against an infant mortgagor. Yet in case of a computation made & confirmed in Chancery on a petition brought by an infant mortgagor, a mortgagee the computation by the Court of Chancery is binding on him, nor can he have the computation raised, except on suggestion of fraud or error. Then the mortgagor, tho' an infant, pays interest on interest; so if he agree to pay interest on interest: thus obtains a benefit to himself.

Tenant for life of an equity of redemption may be compelled by the reversioner to pay one third of the interest & principal due at the death of the mortgagor or to lease the premises — not so, in case of a tenant in tail. The Tenant for life must keep down the whole interest accruing during his estate.

R in 1209
Salk 158. Pow 453

2 Ph Prec 378.
Pow 434

Pow 460.

Doug 378. 6 Mod
P Cs 580.

2 Mod 94.

Pow 310. 315. 317.
346. Co Lit 36.
2 Ch Cs 161.
2 Atk 304.
P Ch 137.

Pow 683.
Powell 317

The holder of a bond has a right to receive both principal and interest — but the men holding of a mortgage deed gives a right to receive the interest only — If the deed be assigned to the holder it is otherwise.

At Common Law, a tender of the money due on a mortgage after the day, is of no avail to the mortgagor: But in Equity such a tender is a bar to interest, provided the mortgagor gave the mortgagee six Calendar Months notice: But the notification must be strictly complied with. The mortgagor must always in such cases swear, that he has always since the tender been ready to pay the money, and that he has not used it for his own profit. If in the notification the mortgagee appoint a place for payment & no objection be made to the place at the time; tender at the place appointed is good. In other cases, tender must be made to the person of the creditor, wherever he is; unless he is out of the realm, or unless a place of payment has been fixed upon in the contract. If the creditor be out of the realm, a readiness to pay is sufficient.

The rate of interest reserved on a mortgage, may be diminished by a subsequent parole agreement; but there is no instance, in which the interest has been raised by such an agreement. This rule seems to be an exception to the Maxim, That a contract, under seal, cannot be altered by a parole agreement it is considered as a waiver of the benefit of the written contract, which waiver an obligee is some cases is allowed thus to make. As in case of rent due by Specialty. So an obligee has been holden to be bound by a parole waiver of the forfeiture of the penalty of a bond.

A mortgage, by a husband after marriage, does not affect the wife's right of dower. But if she join in the mortgage by a fine; her dower is encumbered by it. By the Join in mortgaging the Jointure; this does not waive her right of dower, unless the Jointure was made during coverture. When she joins in a mortgage by fine, she may on the death of her husband redeem; but in this case she must without holding over, pay her part; for she herself joined in encumbering it.

If the husband lend money, & take a mortgage in his own name, and that of his wife; she on his death takes it by survivorship, & yet on a bond, taken in this manner by the husband, he may sue alone. The rule of survivorship in the last case does not operate against creditors. The rule seems therefore to go on the ground, that such a mortgage was intended by the husband as a gift to the wife, on his death

1 P W 138. Pr Ch 65.
2 Bac 123. 5 Vi 403

Pow M 313. 317. 321.
327. 330. Ham 486.
Pr Ch 190. 2 P W 632
700: 3 H 232.
2 Atk 525. 1 Bro Rp
150. 161.

Pow 320.

Pow 112. 1 Atk
503.

Pow 55. Comp
201.

Pr Ch 238. 1 Ver 51.
2 Vi 437. 604.
1 P W 204: 2 Atk 364

Pr Ch 432. 2 Ver
501: 2 Atk 444. 448.
Pow 348. 350. 357.
1 P W 458.
1 Eq Ca Ab 68. 4
3 P Wm 147.

2. [illegible]
Pow M 356. 2 Ver 207.
401: Pr Ch 118. 412.
1 P W 381. 1 Fonb 308.

It Dr [illegible]. 2 Atk
290. 420. Yet the
husband may un-
doubtedly join in
[illegible] release of
his wife's choses in
action.

If the husband's lands be mortgaged in fee before marriage, the wife is not entitled to dower in them & cannot redeem; (otherwise in case of Jointure, the settled after marriage). This rule the contradicted Prin. appr. is clearly settled. It was established, when the wife of the mortgagee in fee had a right of dower. But there is no good reason for condemning it since, the mortgagee estate has been determined merely personal.

If the husbands lands be mortgaged for life or years before marriage; the wife has not dower in the equity of redemption; and may redeem. Qu. Has she any right in the equity of redemption, or in the reversion expectant on the determination of the term?

A husband may be tenant by courtesy of an equity ~~of equity~~ of redemption, on a mortgage in fee.

A mortgage of the wife's land by the husband is void as against the wife; tho it passes the husbands right to the lands; for a conveyance in fee by the husband does not forfeit his courtesy; but such a conveyance operates as a lease, usually lasts for the husbands life, that is, as long as his right to the land would have lasted.

If the wife join by fine in mortgaging her lands; she must redeem the whole, if any; & she is also liable after paid payment like other mortgagors, for subsequent disbursements, making up the original sum, by the mortgagee. She is entitled however to the aid of the husbands personal estate in redeeming, being considered as a creditor to the estate; & she is postponed to other creditors.

If a feme mortgagee marry; her title to the mortgaged estate survives to her as in the case of choses of action; but not against creditors having possession of the mortgaged. And a settlement made upon her by the husband before marriage is considered as a purchase of the estate she has in the mortgage. This rule does not extend to choses accruing to the wife after marriage. Not so if the settlement is expressed to be a purchase of a particular part of the estate, not including the mortgaged property.

If a feme mortgagee marry; her husband may assign the interest in the mortgage; but then the assignment will not be good against her, unless it were made for a valuable consideration. (An assignment of the wife's choses by the husband is good, without any consideration). The creditors of the husband may come upon the wife's estate in a mortgage, as upon other personal property, and the taking of such property by the husbands creditors, is considered as a disposition of it by himself. (If in this case, the

1640 . 8 Geo. Edwards.

2 Atk 420. 2 P W 316
1 Ves 382. 734.

2 Vern 207 & 270.

2 Atk 207.

Pow 360: 2 Vern 270.
2 Atk 207.

Pow 249.

1 P W 459. 470. 652.

estate of the wife in the mortgage was real property it could be extended for so long a time only as the husbands interest in it should continue.

If the husband & wife foreclose; the estate becomes real property, & absolute in the wife. Yet on a petition for a foreclosure (or a suit on for redemption by the opposite) Chancery will not permit the husband to take the money, due on the mortgage into his hands, unless he will make, or obligate himself to make, a settlement on the wife — or unless she will come into Court & voluntarily relinquish, to her husband, all her claim to the property.

If the husband be a bankrupt; Chancery will not allow the assignee to take the wife's mortgage, unless they will make a settlement on her.

If the husband has assigned the wife's mortgage to his creditors; they will hold it without making a settlement. The case is the same if the husband has contracted to assign.

The assignee of a bankrupt in the case just now mentioned, must make the settlement on this ground; that they cannot obtain the wife's mortgage; without the aid of Chancery; and if they ask the assistance of equity, they must do equity; as would be the case with the bankrupt husband himself, if he applied to Chancery. But when the assignment is already made by the husband there is no need of applying to Chancery. So if the husband has already agreed to assign for a valuable consideration; Chancery will consider the assignment as executed.

The case last mentioned, I suppose, excepts the husbands creditors, who takes the wifes mortgage by legal process, from any obligation to make a settlement upon her.

A mortgagor cannot exonerate himself, his heirs by payment to mortgagee, ever after the particular day of payment, even tho the debt be made payable to heirs executors &c.

It has been a question much litigated, whether a second mortgage of the same property, should be considered as a mortgage of the land itself, or of the equity of redemption. Decided to be a mortgage of the land, not of the equity.

A computation by Chancery on a certain estate; position to redeem &c is in nature of a common law Judgment. A Judgment does not merge; and such

(1) We can now treat of estates with regard to the time of enjoyment.

Estates in expectancy are of two kinds. 1. An expectancy created by the act of the party called a remainder. 2. An estate created by operation of law called a reversion. 2 Blk 163.

Of Estates in possession or executed estates, it is hardly necessary to define. However an estate in possession is when a present interest passes not depending on any subsequent contingency. 2 Blk 163. Pow 496.

(2) In this case the two interests are but one estate, being different parts of the same estate, & depends on this mathematical truth, that all the parts are equal & only equal to the whole. 2 Blk 164. Hence no remainder can be limited after a fee simple, for a fee simple is a whole interest, & there can be no residue any part of the whole. Pow 29. Vaughan 269. 2 Blk 254.

(3) A freehold at Com Law cannot commence in future; but freehold rent may, for in this case livery of seisin is not necessary it being incorporeal. 7 Mod 151: 5 Co 94. Fearn 424.

The reason a freehold cannot be made to commence in future, is to prevent the freehold being in abeyance.

7 Mod 167.
Co Lit 143.

2 Bl 168.

2 Bl 168 Plow 25.
1 Co 66. 138: 3 Bl 21.
Fearn 233. 237. 240.

Co Lit 49.
5 Rep 94.
7 Mod 151.

Co Lit 298.
2 Rolle 415. 5 Co 94.

Indeed, in strictness of language, drawn interest; But after a judgement at law, or such a computation in Chancery damages are given for delay of payment according to the usage of courts; & in these cases, the rate of interest has become the rule of damages.

In the English Reports there is no case to be found, in which it has been settled, whether the mortgagee in possession shall refund to the mortgagor, the amount of the surplus of the profits, over the whole amount of his debt & interest. From the silence of reports on this subject, it is supposed that the mortgagee, in such a case, is not compelled to refund.

If a mortgagee in possession, has made a bona fide sale of the property; Chancery will not if informed of this fact, impose on him a double penalty, in case of his neglect to reconvey (as is usual in other cases) on payment by the mortgagor. This rule obtains only when the defeasance is separate.

Of Estates in Remainder

(1). Remainder may be defined to be an estate limited to take effect and be enjoyed after another estate is determined. (2) As if a man seised in fee-simple granteth lands to A for twenty years, & after the determination of the said term, then to B and his heirs forever; here A is tenant for years, Remainder to B in fee.

Rule 1st. There must be a particular antecedent estate.

2d. The remainder intended, to be freehold in contingent remainder, must pass at the creation of the particular estate. (3)

3d. The remainder must vest during the existence of the particular estate, or at the moment of its determination.

A freehold created by deed, must always vest either in possession or Remainder, at the time of making the deed.

If a fee be limited after a particular estate; livery must, according to the old common law, have been given to the particular tenant; and such

(1) A lease at will, will never support a remainder, for the act of entry for the purpose of granting livery of seisin, ipso facto destroys the estate at will. 8 Co 75. Dyer 18. Bac 151 — 2 Fac R 241. 248. 254.

If the particular estate is void in its creation, the remainder intended to be engrafted on it must fail, for the particular estate must support the remainder. Co Lit 298. 2 Rollest 415.

(2) The remainder means estate commences in *presenti* or not at all, the livery & seisin is given to the particular estate, but this in contemplation of Law is giving it to the remainder man.

(3) By which is meant that the absolute or contingent right must pass when the particular estate is ~~determined~~ created, it is not however necessary that it should always pass into the hands of the grantee at the creating of the particular estate. Lit Ten Sec 661. Plow 25. Co Lit 49

It is observable that a remainder originally contingent may become vested before the time of enjoyment; as in the above case if A has a son born during the life of the particular tenant the estate becomes vested at the moment of his birth. By the Com. Law if an estate was limited to a particular tenant & son, & the tenant dies leaving a son in Ventre sa mere the son could not take; this defect is remedied by Stat 10 & 11 Geo 3. and he may now take. Salk 228. 2 Co 51. 4 Mod 282. 2 Bla 169. — 2 Bla 171. — Fearne 424.

(4) A remainder limited to one not in being cannot be limited to one who by common possibility may be in being before the happening of the contingent event, for if the possibility is such as the law deems a remote possibility the contingency is void at its creation. Fearne 175: 12 Coke 51. Co Lit 264. 378. — Fearne. 240.

A remainder can not be limited on two contingent events of which one is contingent on the other. Hob 33. Fearne 175. Dowrand & Lit 25.a 184.a 2 Salk 170. — Fearne 241. 244.

A remainder limited to take effect on the commission of some unlawful act, is bad. For the law deems it too remote a possibility. Co Lit 298. 2 Bla 167. For the same reason a limitation to a bastard is void. 169. 171. Fearne 209. 2 Fearne 175. 176. Co Ll 509: 2 Co 51. Plow 32. — 234. 261. Co Ll 205.

(2) Living accrues to the remainder man, ✓ so is the Law now.

(1) Any limitation tending to a perpetuity is void. Therefore if an estate be limited to A for life, Remainder to B unborn for life, Remainder to B's issue in tail; the remainder to B is void — The final limitation is too remote. A limitation of the inheritance to B would have been good. The rule applies to Devises, as well as to deeds. (4) Yet in cases of this kind, the courts will, in some instances, to effect the general intent, construe the limitations according to the rule of and give B an estate tail.

In case of vested remainders, the expectancy rests in the remainder man, at the time of the creation of the particular estate: In case of contingent expectancies, the remainder rests on some future event; but the freehold, or rather, a freehold must pass out of the grantor at the creation of the particular estate. (3) In the last case it is observable, that the a freehold rests immediately, as it always must, when created by deed; yet the fee simple in remainder is in abeyance.

In all estates created by deed, there must be a present freehold vested somewhere. # (exception in case of rent, in which a freehold is granted, when the rent is granted de novo) but the fee as mentioned above, may be in abeyance. Hence a contingent freehold remainder cannot be limited on an estate less than freehold. For a freehold must pass at the creation of the particular estate: But the tenant of the chattle interest cannot, as such, take the freehold; and it cannot vest in him in remainder; because, it is in the nature of a contingent remainder to vest on some future contingency.

Contingent remainders are by fine

If an estate be given to A for life, to the eldest son of B, the remainder is in abeyance till such son of B is born and then vests instanter.

If the particular estate be void in its creation, or if it be surrendered or forfeited; the remainder (whether vested or contingent) falls with it if contingent.

Is A vested remainder defeated by surrender or forfeiture? This remains a question.

1821

Co Lit 378.
Hobart 33.
5 Rep.t 51.

4 Ze. Ab 745.

4 Ze. Ab Jur. 740
#2 H Bl. 302.
1 2 Ze. A 245. 251.
254.

Fearn 163. 399.
415. 416.

Fearn 292. 295. 297.
298. 421: 3 Ze. R 487.
763. Co Lit 346.
1 Roll 610. 8 Rep.t 94.
Co Ent 9.

1 Ph. 1: 2 Ves 511. 2 Ves
222: 3 Atk 848. Cas t
344: Comp 204.

2 Atk 133. Salk 229.
8 Rep.t 94. Fearn 303.
304. 1 Ford 202.

From this principle originated the expedient, adopted during the civil war of Car 2d for the preservation of remainders, in case of forfeiture by the tenant of the particular estate. An estate was given to A for life, remainder to B during the life of B, remainder ~~during the life~~ to C & his heirs forever. In this case if A should forfeit by treason, or otherwise; B's remainder would not preserve the ultimate remainder during the life of A; and on A's death, C's remainder, would take effect; between the time of the forfeiture by A, and that of his death, B would hold the estate in trust for C, unless the lord of the fee should seize the land & hold it during the life of A, as he could do. But even in this case C's remainder would vest on A's death.

If one remainder or conditional limitation be removed out of the way, a subsequent limitation will take place.

2d if the remainder or limitation which does not take effect be void in its creation. # Not if the preceding estate were void. Nor if the remoteness of the limitation, Nor if the subsequent limitation depended on the prior estate.

When a devise over is made, on a condition annexed to a preceding estate fails by any means, the devise over takes effect.

Of Executory Devises

An Executory devise is such an estate, created by deed to commence in future, as could not be created by deed. If a [illegible] estate, created by devise, could have been created by deed, it is not an Executory Devise but a Remainder.

The law of Executory devises has been established since the restoration; the some of the principles were recognized before. An Executory differs in these particulars from a Remainder. 1st It needs no particular estate to support it. 2 By it a fee simple or less estate may be limited after a fee. 3 A remainder of a chattle estate may be limited after an estate, for life in the same — such a limitation in trust may be by deed, in Equity.

(1) Blackstone says it must happen within a life or lives in being, & during the life of the first Devisee. But in this he is inaccurate. For the rules upon this point as the same in Executory devises, as in remainders.

(2) It has been decided by the Court of Queen's Bench, that the words "if he die without issue" shall be taken in their vulgar sense.

Contingent remainders & executory devises are not transferable at law, that is by Deed, for Deeds always convey a present interest either actually or potentially. But an assignment of an executory devise or contingent remainder is good in Equity. 2 Wood 212. 187: 1 Roll Abr 152: Plow 434. Hobt 132.

A Contingent freehold interest may be passed in law by a fine or recovery, operating as an estoppel. 2 Wood 212: 238. Co. Lit. 593.

A Contingent interest may be released. 2 Wood 213.

3 Ha & Gr. 93. 95.
2 Co Simo other Ch 251. 4.
4 Ch 740. 745. 748. 1 Ves 420.
1 Salk 229. Pr Ch 316.
1 Wils 305: 1 Vern 303.
2 H. Blac 361. 2: 1 Ves 134.
6 Bro. P.C. 451.

Salk Ca. 227. 228.
2 Bla 138 & 2 H Bla 362 358. Bla R 764.
7 Ha R 102: 2 Wood 268 Fearn 314 &c.
7 Co. Rep 595. Fearn 200. 320. 385. 356.

1 H Bla 540.
2 Ch R 308. 314. 376.
10 Ch 452: 3 D. 288.

1 Pont 289. 2 Ch R 376.
Fearn 390.

Fearn 376.

The Doctrine of Executory devises originated in the time of Elizabeth; but was ill understood till a much later period.

The Doctrine of Executory devises originated in the time of Elizabeth but was ill understood till a much later period.

Can a subsequent limitation be accelerated by a former one not taking effect? It can in certain cases. But not when the first limitation is void thro' the remoteness of the contingency.

When an estate of freehold is created by way of Executory Devise to commence in future, without any intermediate particular estate, or when a fee is limited on a fee, the contingency must happen if at all within a life or lives in being, & 21 years & the fraction of a year afterwards (# The same limits have been holden sufficient in Executory devises of personal property). (1) And if according to the terms of the devise, the contingency may ~~never~~ possibly happen at a more remote period, the Devise is void in its creation. If therefore an Estate be given to A & his heirs forever" & if he die without issue, then to B & C, the expectancy of B is void. (For by the words dying without issue is meant a general failing of issue, which may happen two years after the death of the ancestor; otherwise if it can be inferred from other words in the will, that the phrase was used by the devisor in its usual, vulgar acceptation. But unless other words warrant this inference, the phrase "if he die without issue" will be taken in its legal acceptation.

When the remainder of a chattle interest, is limited after a life estate, the ultimate remainder Man must be in esse, & the contingency must happen if at all during the life of the first devisee & the same construction is given to the words "if he dies without issue" as in cases of a freehold to commence in future, & a fee limited on a fee.

When there is such a remainder of a chattle interest limited over in the event of one's "dying without issue" & there are no other words to qualify the legal import of the words, the whole interest vests in the first taker. But if the estate so devised were a lease for lives the remainder thro' void as a remainder, would not of course vest in the first taker; but if he neglected to dispose of it, during his life, it would go to the remainder man as special occupant. (2)

2d. It is not sufficient, that the contingency must happen, if at all, within a life or lives in being, & 21 years & the fraction of a year afterwards (as supra).

When the Executory devise is for life only, only vide.

1850

(1) According to the law, if an remainder not thus vested) the decisions on this point are conflicting. Fearne 361.

In Eng. it is not settled, according to the old law upon this subject, that possibilities were not transmissible. Fearne 228.

Fearne 591: 10 Mod 332. 5 Mod 592. 2 Ch. 251. 254.

Fearne 306. 314.

2 Ble 169. 2 Ve jun

Fearne 286-291-439 Hale Cas 117. 2 Ven 347. 2 Will 29. Fearne 286. 291. 439. 444. Ne

Fearn. 444. 8 Ve 594: 10 Ves. 94. 2 Will 29. Hall 117. 2 Vern 348. 3 Pym 410. 9 Ves 572.

In limitations of personal estate, Courts incline to restrict the words "If he die &c" not so in limitations of real estate.

A remainder cannot be limited after an estate already in esse; such a limitation would be in effect, not a remainder but the grant of the Reversion.

Any limitation in future, or by way of remainder, that tends to a perpetuity is void; as to A in fee remainder to his unborn children remainder to their children &c

A remainder may be devised, sold &c & it is assets in the representatives of its owner, liable to creditors. Decundo, Secundi.

A contingent remainder is uncertain as to its vesting, not only in possession, but in point of interest; not so in case of vested remainders, in this the interest rests at the creation of the particular estate.

Executory Devises cannot be bound like contingent remainders.

If the grantee of a vested remainder in fee, die before possession, the remainder goes to his heirs. If it be a chattle interest it goes I presume to his Executors.

The contingency on which a remainder rests, must be a common possibility.

Remainders originally contingent, may become vested before the determination of the particular Estate; as if a remainder be limited after a life estate in A, to B unborn. then on the Birth of B, during A's life, the interest in the remainder vests. Such a remainder so vested, the moment enjoyed, is transmissible. As to the two first kinds of Executory devises viz when a fee is limited on a fee, & when a freehold is given to commence in future, it is settled, that they are transmissible tho' not enjoyed by the Executory Devisee, & that the executory devise is transmissible on the contingency's happening, even tho' the Executory devisee dies before the interest vested in him. Whether this rule applies to the third kind of Executory devises, viz when the contingent remainder. If such remainder be not contingent there is no doubt that it may be devised of a chattle interest is limited after a life estate is not settled by any direct adjudication. 2 Co Ca 439. 441. If it not settled) It is clearly settled, however that possibilities in personal, as well as real property, are in similar cases transmissible to representatives, & assignable in equity, even tho' the person, to whom they are given, dies before the contingency happens.

(1) A contingent remainder may be barred by a fine or common recovery. An executory devise cannot, for an executory devise is a vested thing from an antecedent estate.
2 Wlk 173. Co J. 593. Fearne 306. & onwards 4 Co 52. 2 Wooderson 227.

Fearne 432.

Fearne 270. 285

Cowp 444. 3 P W 235. Salk 567.

3 Lev 437. 2 Bla 177. Co Ll 302.

2 Wlk Com 179. & Co Lit 195. & 164: 1 P W 17. 3 Rep 30 a 39. 1 Ven 133. Cowp 219. 2 Mill 232. 5 Ter Rep 246

(1) This must be understood of fee simples only. In chattels real, or choses in action which are joint, may be disposed of by the husband. The husband & wife are seised of fee simples jointly, & not by moieties, & there can be no sort of division as long as the estate remains between them.

Yelv 140. 2 Ven 120: 5 Co. 654. 2 Wood 128. Sh Touch 203. 5 Bac 190. 1 Com 552. Co Lit 187. 2 Wlk. 182. & Co Litt 665. 291. 5 Ter. 654.

2 Wl 182. Co Lit 195. 2 Bac 219

3 Bur. 1895 Cowp 217. Co Lit 200 3 Bac 219.

2 H Bla 387: 8 Co Lit 198. 2 Bla 194.

2 H Bla 387. Carth 340. 5 Ray 422. Salk 390. 2 Wlk 194. Co Lit 197. 200. 1 Show 342. 2 Mill 232.

Cowp 217.

When there is an Inventory Devise of real estate, the freehold descends if not otherwise disposed of, till the Devise vests. (1)

The reversion of any estate less than a fee simple remains of course in the grantor. And even when a fee is limited on contingency; the fee remains in the grantor, till the contingency happens.

The reversion expectant on a fee tail is, in prospect, so remote as not to be in law esteemed valuable. An estate tail is an exception to the law of reversion.

In Connecticut that species of Inventory Devise that allows a freehold to be limited in a Chattle estate is not allowed. This was decided by the Supreme Court in the Case of Yates vs Smith.

For the General principles of Joint Tenancy, Coparcenary, & Tenancy in Common, See the authorities in the margin. #

If the husband & wife be Joint Tenants; the husband cannot, by his own act, without the wife, sever the Jointure. (1)

All the Joint Tenants must join & be joined in actions relating to the joint estate.

If one tenant in common or joint Tenant actually turns the other out of possession; Ejectment will lie for the latter. And in some cases trespass (not trespass quare clausum fregit I suppose) will lie for one tenant in Common against his companions.

Tenants in Common must join in trespass & in all other actions, which concern the personality.

Tenants in common cannot join in actions which relate to the realty, for the freehold is several. In Ejectment for rent - neither can they join in a devise in ejectment.

It is a general rule, that the possession of one tenant in common, is the possession of both. The Statute of limitations does not therefore run against one, who may be actually out of possession, unless the possession of the other is shown, either by direct or circumstantial proof, to have been adverse. Proof of actual ouster is said to be necessary; but this may be inferred from long & quiet possession of one only. The old mode of making a partition by consent, was by mutually making out metes & bounds. It is now customary to give Fractional Lots of partition, describing the boundaries; tho' perhaps the old method is still valid; for tho' this mode creates no new title; it may be perhaps, an estoppel to each of the parties to deny his own act.

1684

2 Woodeson 112.
2 Bla. 179.

2 Bla. 179.

Litt Tent Sec 277.
2 Hen 188. 2 Wood 124.
2 Bla 179.

2 Bla 180. 2 Wood 124.

Litt Tent Sec 290.
2 Bla 180. 193.

2 Bla 180. Salk 311.
312. 2 Wood 108. 109.

Co Litt 188. 192.
Co Litt Tent Sec 277.

2 Bla 181. 187.
Litt Tent Sec 282.

2 Bla 181. Litt Ten
285. 2 Wood 127.
2 Bla 181.

Litt Tent Sec 283.
2 Wood 126. 127.

Litt Tent Sec 223.
Co Litt 102.

Litt Tent Sec 278.
2 Wood 128. Salk
311. 312.

Severalty is an estate, of which there is only one during the continuance of his interest.

All estates are supposed to be severalties unless the contrary is declared.

A Joint Tenancy is an estate in lands, or tenements granted to two or more persons to take the interest together.

An estate in Joint Tenancy like that of a remainder is always created by purchase.

Common Law always favours Joint Tenancies rather than tenancies in Common; but if there are words denoting that it shall not be a Joint Tenancy, it shall be a tenancy in Common. Lit Sect 298.

2 Blk. The properties of a Joint Tenancy are derived from its unity, which is four fold. Viz. Title. Time. Interest. Possession. 2 Blk 180. 2 Bla 311. 312.

Both of the Joint Tenants must have an interest of one & the same nature, therefore an estate granted to one in possession, & the other in reversionary, is not a Joint Tenancy.

If an estate is granted to two for their lives, each has a freehold interest for the life of one & both. If an estate is granted to two & their heirs, the entire interest goes to the survivor.

If a grant is made to A & B for their lives, & to the heirs of A. A & B are joint tenants during their respective lives, but A has a fee in Severalty.

If a grant is made to two men or women & the heirs of their bodies, they take a joint estate for life, afterwards the estate is separated & the heirs of each; for the joint estate can go no further, the heir of the one not being the heir of the other.

The rule is the same if the estate is given to a man & woman provided they cannot marry. As to a brother & sister.

But if an estate is given to a man & woman & the heirs of their body the estate is a Joint Tenancy in tail.

In every Joint Tenancy it is necessary that there should be unity of title, or their title must be created by one & the same deed, by one & the same Deposit &c for Joint Tenancies may be created by Devise. It is not necessary good apprehends, that the conveyance be on one & the same piece of paper, but if more than one is used at the same time it is sufficient, but if they did not accrue from the same act, one might be good & the other bad, which would destroy it, at its commencement.

1056

Co Litt 108.
2 Blk 101.
2 Wms 129. 13 Cos
5 Ra 311. 312. Co Litt

Dyer 340: 1 Co 101.
13 Co 56. 2 Blk 101.

Litt Tent Sec 200.
5 Co 10. 2 Wms 130.

2 Wms 128.

Litt Tent Sec 45.
Co Litt 30. 2 Wms 128.

2 Wms 130. Co Litt 214
19
2 Blk 102. Co Litt 49.
Hob. 364.

2 Ves 215. 216.
Co Litt 194. 195.
Cath 328.

3. Leon 262. 2 Blk 103.
2 Blk 103. 1 Leon 234.
2 Bro 403: 2 Blk 103.
2 Wms 130: Co Litt 200.

The estate must be created at one & the same time, for if it is created at different times it can not be a Joint Tenancy. This rule is questioned by Brownson.*

Two persons may hold an use as Joint Tenants tho it vests at different times, for the use has relation back, in contemplation of law, to the time of the feoffment, therefore not an exception to the general rule.

It is necessary in every Joint Tenancy that there be a unity of possession. As if there are two Joint Tenants, each is seized of an undivided half of the whole, & not the whole of an undivided half, by the form of which expression is meant a moiety of each particle of earth in the whole piece, by the latter an half of the whole piece in whatever way it may be divided. ~~Lit 70~~

If personal chattles in possession are given to the husband & wife, they vest absolutely in the husband.

A wife is not entitled to dower in an inheritance held jointly by the husband & another, when the husband dies first. But whether the husband is tenant by courtesy of land held by the wife in Joint Tenancy with another is a question.§ Yours [illegible] in principle there can be no distinction in this case, with regard to the rights of the wife in respect of & concerning the rights of the husband to take by courtesy.

Acts done by one of several Joint tenants are generally operative as to all, this rule is [illegible] on the unity of possession & of interest. As if two joint tenants execute a verbal lease & rent is [illegible] to one of them, it will accrue to both. So also livery [illegible] seisin made to one Joint Tenant is deemed to be livery to both. Also on entry by one in favour of both. 2 Bl 152. Co. Lit. 49. 319. 364.

So also all the Joint Tenants are to sue or be sued jointly. This rule also depends on the unity of interest & possession.

This last rule is not practised upon in Con, indeed strictly speaking there is no Joint Tenancy in Con, but we have a sort of estate which we call Joint Tenancy.

One Joint Tenant cannot maintain trespass against the other, for each [illegible] a right to the whole.

One Joint Tenant cannot do any act which will defeat the estate of the other, but he may dispose of his share.

By implication of the stat of Westminster 2nd One Joint tenant may [illegible] the action of waste against another, for waste tends to ~~the~~ defeat the estate of the other.

At Common Law one Joint Tenant cannot have the action of account against another for the profits received, but one Joint Tenant may make a bailiff of the [illegible] In that situation may sustain the action

2 H. 130: Co Lit 200.

2. Blk 183. 184
2 Wood 125.

Lit Tent Sec 980. 200.
2 Wood 125.

2 Blk 184.

Wood 125. Lit 2 S 281.
Co Lit 181. Watsons
Law Partnership 49. 140.
146. 294. 299.
11 Co 3b 4 Leon 217.
2 Ra 281. 340.

Wat L Part 17. 116. 132.
1 Bay 242. 252. 2 Wood 125.

1 Blk 184. Co Lit 119.
Finch Law 83.
2 Lev 12.

2 Wood 126. Lit 2 S 296.

2 Lit 181. 2 Wood 186

2 Blk 185.

2 Blk 185. Co Lit 188. 193.

Lit & L 294. 2.
Star Con 258.
2 Blk Com 185.

But now by the Stat of Anne one joint tenant may sue the other in an action of account without having previously made him bailiff.

The grand incident of Joint Tenancy viz (Survivorship) depends on this unity of interest & possession.

Survivorship or the Jus accrescendi is the right of the survivor to the whole interest remaining in the tenancy at the death of the other or others.

So if an estate is given to A & B & their heirs, if A dies first the fee goes to B.

And if there are three Joint Tenants on the death of one of them the whole interest vests in the surviving two, if one of these two dies, the whole interest vests in the survivor, & the rule is the same however great the number of joint tenants.

The doctrine of survivorship depends on this sole special reason. Viz. The original interest of all the joint Tenants is the same, this original interest is not divested by the death of his companions, companions, this being the case no one can claim the same estate that the deceased had in the land, the survivor is therefore supposed to have a higher interest in the whole than any one else to any part of it. 2 Blk

These rules of Tenancy relating to title, Interest &c & also the doctrine of survivorship hold equally in personal Chattles as in real estate, except in the case of Joint Stock in trade, for in this case no survivorship is allowed; on the ground that it would check trade & commerce.

Partners in trade are not Joint Tenants to all purposes, tho they are to most, & are generally so esteemed.

By the Common Law the King or other corporation cannot be a Joint Tenant with a private person, for according to Blackstone the private person has no chance of survivorship. The above reason given by Blk does not seem to be the true one, for two corporations can not be Joint Tenants.

The chance of survivorship need not be mutual and in many cases is not.

A Joint Tenancy may be destroyed by destroying any of its unities. The unity of time cannot be destroyed by any thing but fact, for it is a fact.

But a Joint Tenancy may be destroyed by a destruction of the unity of possession. As if the Joint Tenants sever their estates & hold them seperately. The Jus Accrescendi ceases, when the estate is severed.

By Common Law one Joint Tenant could not oblige the other to make partition, tho they were allowed to divide by agreement. The reason for this was, that it must be by agreement of all to sever an estate, which could be created but by all. By Stat 31. & 32 Hen 8. one Joint Tenant may compel partition, by a writ of partition. In Con[illegible] Stat to the same effect

Dec:

(1) In New York by Stat, the real estate goes as in Gavelkind Borough — Viz — to all the sons equally provided there are no daughters — if there are then to all the sons & daughters equally — Consequently in all cases where there is more than one heir they hold as Copareners.

Lit Tent Sec 292.
2 Wood 130. Co Lit 186.

Lit Ten Sec 207.
Co Lit 185.

Co Ll 470. Co Lit 182.
2 Co Co. 2 Blk 186.

Lit Tent Sec 302. 3.
Co Lit 391.
Lit Ten Sec 294. 304.
2 Blk 186.

Co Lit 188.

2 Blk 187.

Co Lit 252: 2 Lev 235.

Co Lit 199. 200.

Lit Tent Sec 240. 242.
2 Co Lit 165
2 Wood 113.
Lit Tent Sec 265.
Wood 2 Blk 157.
2 ~~Blk 188.~~ Co Lit 163.
2 Wood 113. 11 — 6.
2 Blk 188.
Co Lit 164. 180. 234.

The Con Stat extends not to town Commons or sequestered lands. The Stat provides, when an infant is Joint Tenant, that his Guardian with the consent of the Probate, who will appoint two persons, may make partition.

A Joint Tenancy may be destroyed by the destruction of the unity of title. If then A & B are Joint Tenants A alienate his rights to C. B & C are tenants in Common.

A Devise by one joint tenant does not sever the estate, but the Survivor takes the whole, for his claim is prior to that of the Devisee.

A Joint Tenancy may be destroyed by destroying the unity of interest. As Should one Joint Tenant purchase the whole interest the tenancy is destroyed on the principle of merger.

So if one Joint tenant makes a lease for life of the premises, this destroys the Jointure.

If one of three Joint tenants alien his share, the remaining two hold their estate in Joint Tenancy, but there is a severance as to the share sold.

It is universally true that the Jus accrescendi ceases, whenever the Jointure is done away, for the Jus accrescendi depends on the unities.

It is generally advantageous to sever the jointure, but in case of a joint estate for life, it is not advantageous.

If one of two joint tenants for life aliens his part for the life of another he forfeits his whole estate.

If one of two joint tenants disseise or evicts his companion, the one evicted may have the action of ejectment to regain possession, to entitle him however to this action there must have been an actual ouster.

The doctrine of survivorship has been repealed in Connecticut, for which reason [illegible] apprehends there can be no Joint tenancy strictly here, but persons may hold land as joint stock in trade is held.

Copartnery

(1) Copartnery is an estate which has descended to two or more persons, in which case they inherit as co heirs.

This happens in England where the doctrine of Gavelkind prevails, for then all the sons inherit equally.

All the copartners are considered but one heir for they all take but one estate.

The properties of copartnery are three, unity of interest, of title & of possession.

Copartners may [illegible] & be sued jointly, & to move [illegible] the [illegible] of the other

1682

7 Ten 386.

2 Blk 188. 2 Inst 403.
Co Lit 174 a

Lit Tent Sec 264.
2 Blk 188.

Co Lit 164 b. 165 a.

Co Lit 164. 174.
2 Wood 114. 115.

Co Lit 165. a

Co. Lit 164 a & b
2 Wood 115.

Co Lit 164 a & b
2 Wood 114. 115.

2 Wood 115.

Lit Tent Sec 309.
2 Wood 118. 119.

2 Wood 118. 119.

Co Lit 167 b

2 Wood 119. Lit Tent
Sec 264.

2 Blk 189: 2 Wood 120.
Lit Tent Section 243 &
or 264.

2 Wood 120. Lit Tent
Section 241.

An entry by the guardian of an infant who is the coparceners is the entry of the others.

Coparceners cannot maintain the action of waste against each other, neither can they maintain an action of trespass, because they can compel the other to make partition at any time.

Coparcenary differs from joint Tenancy in four particulars. 1st Coparceners always claim by descent, whereas only inheritances can be subjects of Coparcenary. Joint tenants always claim by purchase. — Indeed whatever can be inherited can be held in Coparcenary.

2d In Coparcenacy no unity of time is necessary, this is requisite in Joint Tenancy.

3d Coparceners have not an ~~unity~~ entirety of interest, but each is seized of a distinct moiety, therefore when one dies the Jus Accresendi, but it descends to their heirs.

The mode of dividing among coparceners is per capita if the claimants are related to the ancestor in equal degree, or if they do not take by representation.

But if the coparceners are not related to the ancestor in equal degree, or are entitled by right of representation, they take per Stirpes.

In descents from coparceners male and female as in other cases of descent.

As long as the land continues in course of descent the profession not being disunited, it is held in Coparcenary. If one alienates, the coparcenary ceases. Also if it is severed by partition.

Also if one coparcener dies, leaves another, the coparcenary is destroyed.

If two coparceners marry & die, their husbands who are tenants by Curtesy, do not hold the estate in Coparcenary.

It is not settled that the wife is entitled to dower in a coparcenary estate of her husband, but the husband is entitled to be tenant by the Curtesy of the coparcenary estate of the wife.

Among coparceners partition may be made by consent, and by compulsion.

Partition may be made by consent several ways, 1st When the Coparceners agree to divide the land into equal parts in severalty. 2d When they agree to choose some friend to make partition. 3d When the eldest divides in which case she or he will choose last. 4th By casting lots for their shares.

Coparceners may be compelled to make partition by a writ of partition; or by a bill in Chancery for a Dec.

1084 ss

2 Blk 191.

Lit Tent Sec 2[illegible]

2 Blk 191.

Co Lit 189 Co Bac 88.
1 y 4.

2 Blk 192.

Lit Tent Sec 293. 295.
2 Wms 134. Co Lit 189
191. Lit Tent Sec [illegible].
3 Bac 1 or 394.

There are two Judgments on a writ of partition. 1st That partition be made & then a writ issues to the Sheriff commanding him to make partition. — The 2d Judgment is that the proceedings of the Jury be confirmed.

Formerly the most common method was to petition Chancery, and it is the mode now if there are no encumbrances on the estate.

When an indivisible thing is holden in coparceny the eldest shall have it if she or he chooses, if not they hold it by turns. When the eldest chuses, compensation must be made the others by giving them an equivalent in other parts of the estate.

Tenants in Common

Tenants in Common are persons who hold an estate by several distinct titles, but by an unity of possession. This definition gives us to understand that no other unity than that of possession is necessary. But a tenancy in ~~Dower~~ Common may have all the unities, indeed it may have all that is necessary in creating a Joint Tenancy.

There a tenancy in common has all the unities of a Joint Tenancy, the leading difference between them is, that the tenants in Common own the whole of an undivided half.

The presumption is, when an estate has all the unities requisite to create a joint estate, that such was the estate intended to be conveyed, unless apt words are used denoting that the estate is a tenancy in Common. But if there is no other unity than that of possession, the estate is of course a Tenancy in Common.

Cokes definition of a tenancy in Common is, that they are those who hold by several titles, or by one title & several rights.

One tenant in Common may have an estate in fee & another in tail of the same lands — one may hold by purchase from A & the other by purchase from B — or by descent from A & the other by deed from A; for unity of title is not necessary. Also one tenant may vest at one time & the other at another time.

A Tenancy in Common may be created by such a destruction of a Joint Tenancy or Coparceny estate as does not sever the possession, or by a special limitation in a deed or devise. —

Lit Rent sec 283.
2 Wms 192.
3 Wms 194.

2 Wms 134. 3 Wms 194-5.
2 Wms 193

3 Wms 193.

3 Wms 195. 2 Wms 193. 4.

Lit Rent sec 298.
Co Lit 190.b 2 Wms 193.

Lit Rent sec 299.
Co Lit 190.b

Pop 52. 2 Wms 193.

3 Co 39. 1 Rol 32.
2 Co 32. 365. 366.
2 Roll 90.

2 Wms 193. 1 Lyons 241.
1 Ch 17. 241.
2 Ray 622. 1 Will 341.
2 Wms 135.

Lit Rent sec 3. 6. 135.

Lit Rent sec 45.
2 Wms 135.

2 Wms 135. 136.

If an estate is granted to two men & two women, they are tenants in Common of the inheritance.

It is a general rule that when a Joint Tenancy or Coparcenary is destroyed without partition, it is a tenancy in Common.

By express limitation in a Deed or Devise a tenancy in Common may be created, but here care must be taken not to use words importing a Joint Tenancy.

It is a general rule that if one grants by Deed or Devise to two or more persons, which is not a Joint Tenancy, it must be a tenancy in Common. The rules of construction at Common Law favour Joint Tenancies. The reason given is that they increased services under the Feodal system. Tenancies in Common.

The most usual way of creating a tenancy in Common is to grant to two or more to hold as Tenants in Common not as Joint Tenants.

Other words will answer, as a grant to A & B, the one half to A, the other half to B, this will be a tenancy in Common, for here an distinct interests granted. — If one holding an estate in severalty grants one half to J.S. then the original owner & J.S. are Tenants in common.

A Deed or Devise to two or more persons to hold jointly & severally creates ~~implies~~ a Joint estate, for it is said that the word jointly implies a Joint estate & severally coming after it must signify only a power to sever. But an estate granted to two or more ~~to hold~~ severally, would be a Tenancy in Common.

An estate devised to two or more to be equally divided between them is an estate in Common.

It was formerly holden that if an estate was conveyed to two or more to be equally devided between them that it was a Joint estate; but this has been overruled.

A Tenancy in Common may be created in a freehold — in an inheritance — in a Chattle real & Chattle personal.

A wife of a tenant in Common of an inheritance is entitled to Dower, but it is not settled whether a husband of a wife who is tenant in Common could be tenant by the Curtesy, there is no reason for the difference. One ~~Joint~~ Tenant in common may directly convey his share to his Co-tenant, but one Joint Tenant cannot so convey because he is seized of the half & of the whole, but one Joint Tenant may release his share to his Co-tenant.

2 Wlk 194. 2 Mod 136.

2 Wlk 194.
Lit Ten Sec 311. 2 Wlk 390.
Co Lay 222: 2 H Wlk 387.
Co Lit 197b: 2 Bac 216.

Lit Ten Sec 315.
2 H Wlk 387. 388.
Co Lit 198b.

Co Lit 197b. 2 Mod 202.
2 H Wlk 387.

1 Show 342: 3 Bac 216.

Co Lit 200: 2 Will 234.
2 H Wlk 387.

Co Lit 199. 172a. 186b. 200b.

2 Wlk 183. 184.

Co Lit 199b. 200a. 314. 358.
3 Will 118. 2 Wlk 392.
7 Mod 39. 2 Mod 202. 327.
750. 830: 8 Mod 109.
Stg 531. 960. 1182.

Comp 217: 3 Burr 1825.
Co Lay 312: 12 Mod 615.

Tenants in Common at Common Law are not obliged to make partition, but by Stat 31 & 32 Hen 8 they were made compellable.

There is no survivorship in tenants in Common.

Tenants in Common cannot join in actions relating to the reality for their interest & rights are several.

But if an indivisible thing is to be sued for, as a horse, then they must join.

So in actions of trespass & all personal actions founded on a tenant in Commons interest, all must join, this is on the ground of policy & the damages to be recovered are not severed — indeed they survive.

If tenants in Common make a lease reserving rent, the rent follows the reversion, & in an avowry for rent they must sue severally.

If tenants in Common are ejected, they cannot join in an action to recover the possession.

Neither can Tenants in Common make a joint Demise on which to found an action of ejectment, for the lease is ab initio Defective.

Judge Reeve says it does not in Com, tenants in Com may either all, or joinder several. This rule if true is defective, being loose.

At Com Law one Tenant in Com could not sue his copartner in an action of account, if he had received the whole rent, unless he had previously made him bailiff. But by Stat 4 Ann one Tenant in common may have this action of account against his Co Tenant, without making him bailiff.

By Common Law one Co Tenant could not sue his Co-Tenant in an action of waste, but by Stat 2nd Westminster he may.

So if one Tenant in Common disposses another the latter may have an action of ejectment to recover possession. To enable him to bring this action there must have been an actual ouster, for until then the possession of one is the possession of the other.

There is much dispute in the books about what is an actual ouster; as it is called, but the books must mean that the dispute is about "what is evidence of an actual Ouster" for it is plain that an actual ouster is a peaceable dispossession of the possession.

The sole possession of a tenancy in Common, by a tenant in common, will not amount to evidence of an actual ouster. But the sole adverse possession of a tenancy in Common is sufficient evidence of an actual ouster in which case the Court leaves it to the Jury to infer ouster from the facts. But Gantt supposes the Court determine on it themselves. 1st Sole & separate possession

1671

3 Ves. 219; 3 Ves. 1895.

3 Will 118.

Cowp 217.

Ca. 9

2 Atk 200. Atk 923.

2 Atk. 194.

for a great length of time as 30 years without accounting is sufficient evidence of an adverse possession.

A conveyance of a lease, entry & ouster by the Deft is sufficient evidence of an actual ouster, that is, it is sufficient to prevent the Pltff from being non suited, tho' not conclusive being only evidence to a Jury.

After one tenant in common has recovered in an action of Ejectment, he may have res ps for the same profits, for this is incident to the action of ejectment.

The Stat of limitations does not run against a tenant in common out of possession, if his co-tenant is in possession, unless in case of actual ouster. Our Stat of limitations limits the time to 15 years after title accrued, the Stat of 21 James 1.st to 20 years. An actual ouster may be inferred several ways.

The remedies above recited against a tenant in Commons extend only to actions on things real or which savour of the reality. Therefore if one tenant in Common gets the possession of a personal chattle his Co-tenant has no remedy unless he can recover possession, for no action can be brought. Therefore seize it when he can find it. If he apprehends he could get no remedy by applying to Chancery.

A Tenancy in Common may be destroyed 1.st by Partition. 2.d By uniting all the interests in one person; the estate then is holden in severalty.

Descent

There are but two ways of acquiring property. viz by descent & by purchase.

Descent or hereditary succession; is the title whereby a man on the death of a relation acquires property by right representation as heir at law.

By purchase is any other method of acquiring property except that by descent; or it may be defined to be the Estate in lands or tenements which a Man has by his own act & agreement & not by the descent from any of his ancestors or kindred.

There are many ways of acquiring an estate by purchase, but the principal ones are by Devise, Succession & Alienation.

Our law in America with respect to descents varies materially from that of the English as regards to real property.

1072

(1) In the Distribution of personal property brothers & sisters of the whole & half blood succeed equally.

(2) This statute is adopted in the State of New York. See State v. Y. 538.

2 Vesey 213.
1 Y & Coll 249. Ob 274.
1 Salkeld 252.

Descent

With respect to personal property the rules in both countries are ~~[illegible]~~ the same. Our methods of acquiring property in real nature by descent, are in connection much the same as theirs of personal. Consequently by acquiring an accurate idea of their law of Descent of personal property, a tolerable accurate knowledge of ours of real is obtained.

Descent of Personal property

In England. or the Stat of Ch.s 2.d

The laws which regulate the descent of personal property in Eng depends upon the Stat of Chas the 2.d The Descent of real depends upon the Common Law.

Stat Chas 2.d If after a man's debts are paid there is personal property left, one third goes to the wife, the remainder is divided equally among his children and their legal representatives; if no children & a wife, then the wife takes half, & the next of kin & their legal representatives the other moiety.

"The Stat declares that amongst collaterals there shall be no representation beyond brothers & sisters children. When they are all equally near of kin they all take an equal share, but when they take by representation they only take what their parent whom they represent would have had." (P)

What is meant by taking by representation may be collected from the followed example. Viz A Dies leaving three sons B, C, D and B dies leaving two children, & then the father of B dies, then B's children take the share that B would have had as his legal representatives. But if the three brothers B, C, D died, then their children would take, not as the representatives of their fathers, but per capita, that is an equal share of their grand fathers estate.

In the distribution of personal property, no respect is paid to primogeniture nor sex. (1)

There is no limitation for representation among the descending line. If therefore A Dies leaving sons, which sons die leaving children, part of which children die leaving issue, their issue will take by representation their parents shares; and so on to infinity.

Upon the failure of lineal descendants a man's next of kin take the property. In order to ascertain who a person's next of kin are we must compute according to the civil method. That is to say we must

8.581

(1) If the mother is living, the father & brothers being dead leaving children, these children will take per stirpes; for the mother is for this purpose considered one of the original stock.

(2) All the personal property of the wife's is vested in the husband absolutely; and all the Choses in Action provided he takes possession of them during her life, otherwise they go to her representatives.

Lovelap on Wills 71.

2 Vern 213: Pr Ch 54.
1 PW 49. 80.
The following authorities state all the preceding rules.
1 Atk 20. 351: 1 PW 81.
Pr Ch 571: 1 PW 23. 25
394. 1 Atk 594.
2 Bla 517: 1 Ves 333.
1 Atk 457: 3 Atk 742.
2 Vern 317: Cath 51.
2 Vern 124: 1 Ves 156.
2 Atk 742. Cath 455.
Atk Walker vs Watson
1 PW 25. 595: 3 PW 5.

Count from the intestate to the common ancestor of him & the claimant, & then downwards, each degree both upwards & downwards being computed, and if the number of them is less than what they are to any other relation, then he is the next of kin.

In the distribution of personal estates half blood succeed equally with the whole.

Posthumous children can succeed

By a subsequent statute enacted in the reign of James, the mother upon the death of her child, the husband being dead, can succeed only to an equal portion of the sons estate with the surviving children. (1.)

If one has had any portion of the estate he cannot succeed to any other of the fathers estate without surrendering such property into hotchpot.

When all the persons claiming an estate stand in their own rights as being next of kin, they are said to succeed per capita; as is the case with the children of a deceased father; but if any of the children be dead leaving issue, then their issue are said to be their "legal representatives."

But when all those who would have succeeded to an estate in their own right as brothers or children, then the right of representation is at an end, & they all claim in their own rights.

The uncles & aunts being all equally near of kin will succeed per capita. This must be understood when the right of representation is at an end.

The brothers of the whole of kin are preferred to the grand father, & this is the only exception to the rule that the next of kin succeed & that equally.

~~All the personal property & choses in action of the wife may become the husbands if he takes possession of them; but if he does not then go to her next of kin. If the choses in action go to the kin; the personal property goes to the husband whether he takes possession or not.~~ (2).

The following cases are distributions under the Stat of Charles 2d.

1 Case — John Stiles is dead & left three children A B & C. In this case they inherit the personal property equally after discharging his debts.

2d Case. J. S. is dead leaving three children A B & C. and A is dead leaving two children D & E.

Then B & C succeed each to a third of their father's estate & the children of A take between them the other

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which would have descended to their father.

3.d The same as before only B is dead as well as A and left three children F, G & H.

Then F, G & H succeed to their father's third, the other two thirds going as in the last case.

These two preceding cases are regulated by the principle or rule, that while any of the original stock are living the issue of the dead ones can claim only as their parents representative.

4.th The same as the last only C is dead leaving one child F.

Then the surviving children of the original purchaser succeed each to one ~~third~~ sixth of their grandfathers estate.

This case upon the rule that when all the original stock who would have inherited the estate die ~~upon~~ before the father then the descendants succeed per capita.

5.th Then the case is the same as the second only D one of the Descendants of A is dead leaving K & L.

Then they stand in the place of D and take his portion between.

6.th Then all the children of the person from whom the estate descends are dead, & one of the grand children D, leaving two sons K & L.

They then stand in the place of their father D the grand child of A & take his portion.

These two last cases are regulated by the rule that the claim by representation is allowed in infinity in lineal descents.

7.th John Stiles has no issue but his father Solomon, & his mother Mary are alive & also his brothers Tom & Dick & his sister Sally Stiles of the whole blood & John & Susan of the half blood were alive.— Then the father takes all.

For the rule that upon failure of issue you are to go to the next of kin & pursue the civil mode of computation then prevails.

8. This case is the same as the preceding only the Father Solomon is dead.

Then the mother Mary & all the children of the half as well as whole blood take equally.

For there is is a stat that degrades the mother to an equality with the children; & the half blood succeed in personal property as much as the whole.

9.th This case is the same as the preceding only the mother is dead, & Tom the brother, leaving three children, A, B, & C. Then the children of Tom succeed by representation

(1) The words of the Stat are "To the next of kin, ~~[illegible]~~ to & of the blood ancestor from who the estate came". The strict grammatical construction of these words means, the next of kin to the person from whom it came. But this is not adopted by our Court.

(2) In estates acquired by descent, devise deed of gift, our statute does not regard legal representatives beyond brothers & sisters children.

(3) The words of our Stat are "Then to brothers & sisters of the half blood & their to the next of kin & their legal representatives" "legal representatives" ought to succeed the words "half blood". For in no other branch of the Stat is any thing said about the legal representatives of the next of kin. If we construe the Stat as the words of it import, legal representation is allowed amongst the next of kin in infinitum; which construction would contradict another clause which limits it to brothers & sisters children.

(4) This clause it will be recollected extends to those cases only where the property did not come by descent, devise, or deed of gift from an ancestor. Where it did no preference is given to the whole blood over half.

As to the law of N.Y. on this subject see Statutes of N.Y. 45.

Descent of ~~Personal~~ Real property in Connecticut

The property which an Intestate acquired by Descent, Devise, or deed of gift from an ancestor, does not descend in exactly in the same manner as that which he acquired by purchase. The inherited estate, if he has no issue, goes to the brothers & sisters as well of the whole as half blood, provided they be of the blood of the ancestor from whom the estate came. (2) On failure of these it will go to the next of kin provided they are of the blood of the ancestor from whom the estate came (1) Where there is issue they are preferred in any dg.

With regard to the meaning of the words "of the blood of the ancestor" much doubt has arisen. According to the old feodal idea it meant the lineal descendants of the ancestor; according to the Stat of Bowes it means related to; This in all probability is the meaning of our legislature, otherwise they have often made laws without any meaning. In estates acquired in any other than the above mode, Purchased Estates, go as follows.

If a man dies without issue it goes to the brothers & sisters of the whole blood, & their legal representatives; if no such then to the father & mother as being the next of kin; if they be dead then to the brothers & sisters of the whole & half blood & their legal representatives; & on failure of these to the next of kin. It ought always to be recollected, that in the distribution of purchased estates, brothers & sisters of the whole blood & other kindred of the whole blood, are always preferred to brothers & sisters & other kindred of the half blood of the same degree. (3,4) The brothers & sisters & other kindred of the half blood if of a nearer degree of kindred than those of the whole, are always preferred.

Under the Civil Law, as well as under the Stat of Bowes; brothers & sisters of the whole & half blood & their legal representatives, are preferred to grand parents, tho' they are as near of kin to the intestate; This rule prevails as well in ancestral estates & personal property as in purchased ones.

The following cases are distributions under the Stat of Connecticut.

1st Case. John Stiles left no issue & upon his death was seized of Black Acre, which came to him by Descent, or devise, or deed of gift from his ancestor Tenbam; & of White Acre which he acquired by purchase with his own money. — He left brothers & sisters

1681

Viz Sam Stiles of the half blood, & Tom & Sally Stiles of the whole blood all descendants from John's father Newton; likewise John & Susan [illegible] of the half blood, descendants of his mother Mary Stiles, who is still [illegible]

The farm called Black Acre which he acquired from his father Newton by descent descent, devise, or Deed of gift, will go in equal portions to Sam, Tom, & Sally Stiles, to the exclusion of John & Susan Rowe & his mother Mary.

This distribution is founded upon the following rules. 1st It goes to his brothers & sisters of the whole & half blood equally, for the Statute allows no distribution in estates that were inherited from an ancestor.

2d It goes to them in exclusion of John & Susan Rowe; for the Statute requires that to succeed to such an estate they should be the next of kin to the intestate & of the blood of the ancestor from whom the estate came.

3d It goes to these brothers & sisters in exclusion of the Mother, for the [illegible] provides that they should be of the blood of the ancestor from whom the estate came.

The estate called [illegible] Acre which he purchased with his own Money goes as follows. Viz To [illegible] & Sally Stiles.

For in purchased estates where there is no issue the Stat prefers brothers & sisters of the whole blood to all other persons.

2d Case. This is the same as the preceding, only Tom & Sally Stiles are dead.

The inherited estate will go wholly to Sam Stiles in exclusion of all other persons, & this for reasons mentioned in the preceding case.

The purchased estate will go wholly to Mary Stiles in exclusion of all other persons, & this for the following reason; it is said in the Stat that on failure of issue, & brothers & sisters of the whole blood, it shall go to the next of kin. 3d Case. The same as the preceding only Mary Stiles is dead.

The inherited estate in this case will go wholly as in the second for reasons given in the first.

The purchased estate will be equally divided between Sam Stiles, & [illegible] & Susan Rowe; for they are the next [illegible]

4th Case. Like the former only Tom Stiles left issue & Sally Stiles is living.

Then Sam & Sally Stiles will each succeed to one ~~fourth~~ third ~~third~~ of the inherited estate for reasons mentioned in the first case, and it will be entitled to the ~~remaining~~ third as being the legal representative of Tom Stiles. for representation is [illegible] recognized in estates of this description, as among brothers & sisters.

1804.

One moiety of the purchased estate will go to Sally Stiles, the other moiety to A Toms legal representative & for reasons mentioned in the first case.

5.th Case. This is the same as the last only Tom is dead without issue.

Black Acre will go ~~one half~~ equally to Sally & to A Toms ~~& the other to A as Tom's legal representative~~ legal representative; for reasons before given.

White Acre will go as in the last case.

6.th The Blood of the Stiles is extinct.

In this case black acre must escheat; for it can go to no person but the blood of the ancestor from whom the estate came, which is now extinct.

White Acre will go to John & Susan Rowe, they being the next of kin to John Stiles.

7.th George Stiles the uncle of the deceased & brother of his father is living: Distribute Black Acre as if the words "of the blood" meant related to & also as if they meant lineally descended from.

If the words of the blood means related to then George will be entitled to the estate for he is the next of kin, & of the blood of the ancestor from whom the estate came. If they mean lineally descended from the estate must escheat, for Reuben has no lineal descendants.

8.th Case. George Stiles is dead & Tom left A & Sally B & C who are living. First distribute Black Acre as if representation was at an end & as if it existed in this case: And then distribute White Acre upon the same ground.

If we consider representation as at an end then A, B & C would take per capita, each one third part; they being the only descendants of Reuben & the nearest & equally of kin to George Stiles.

If representation continues then A would take one moiety in right of his father Tom; & B & C the other moiety in right of their mother Sally.

White Acre if representation is allowed goes to Tom & Sally's descendants, one half to each in exclusion of John & Susan Rowe, John Stiles half brother & sister; for they would stand in the place of Tom & Sally John's whole brother & sister, whole Brothers & sisters being allowed the preference to half in the inheriting to purchased estates.

If no representation is allowed then John & Susan Rowe would be entitled to the estate; for they are nearer of kin to John than A, B & C & whole blood is preferred to half in the distribution of purchased estates, when they are equally near of kin.

1696

9th Case. This case is like the preceding only George Stiles the uncle of John the intestate is living.

Here Black goes to Tom & Sally's descendants, as their legal representatives; for the Statute prefers brothers & sisters of the whole blood & their legal representatives to all other persons provided there is no issue. But if representation does not exist in this case, & the words "of the blood" means next of kin, then the uncle will be admitted to one fourth share of the estate the other three shares going equally to John's ~~representatives~~ nephews.

If of the blood means linearly descended from & representation is not allowed, then the estate will go to A & B per capita as being the nearest of kin & of the lineal blood of the first purchaser.

White acre goes as in the last case & for the same reasons. 10th [illegible] is dead & A is dead leaving D & E and Sally is living.

Black acre will go solely to Sally for representation in collateral relations is not allowed beyond brothers & sisters children.

The being the only sister sister of the whole blood, & all the brothers being dead, will be entitled to White acre.

11th Sally is dead leaving children B & C, the remainder as before. Distribute Black acre, also White acre. This case as if representation existed, & as if it was at an end.

Black acre will go to B & C in right of their mother Sally, representation not being allowed beyond brothers & sisters children, D & E will be excluded of course.

White acre if representation is at an end will go to John & Susan Rowe for reasons before given.

If representation is allowed, then B & C will take White acre as they then stand in the right of their mother Sally who would have succeeded to it, being a sister of the whole blood.

12th Sam case only B is dead leaving F, & C is dead leaving G & H — distribute both case.

Here Black acre will be divided into five shares, & D, E, F, G & H will succeed each to a share; for they are all equally near of kin to John Stiles & are of the blood of the first purchaser.

White acre will go to John & Susan Rowe for reasons before given.

13. Sam case only John Rowe is dead leaving issue F. distribute white acre as if the words representations were rightly placed as they now stand, & as if they were misplaced & ought to have come after the words Brothers & sisters or the half blood.

Black acre goes as before.

If the words "legal representatives" are rightly placed as they now stand, Susan will succeed to white acre in exclusion of F; if they are wrongly placed & should stand after "Brothers & Sisters of the half blood" then F will succeed to one moiety in right of his father John Rowe, & Susan Rowe will succeed to the other half.

14. Susan is also dead leaving K & L.

White acre goes to F, K & L they being the next of kin, & altho' not of the whole blood yet nearer than any of the blood, which is sufficient by the Stat to give them the preference.

15. The Stiles are extinct & H is dead leaving M. Distribute White Acre upon the same hypothesis as in the last case but one.

In this case Black acre will escheat.

If the words "legal representatives" are rightly placed, then K & L will divide the estate between them. If the words are not rightly placed, then M will succeed to a moiety of the estate in the right of his ancestor John Rowe; which distribution would be a direct contradiction of the Stat, which says that representation shall not be allowed beyond Brothers & Sisters children.

16. K & L. are also dead, K left C & D. L left P. Distribute both cases with the reasons.

Black acre will go to D, L, F, G & H equally they being the nearest of kin to John & of the blood of the ancestor from whom the estate came.

They will likewise succeed to White acre in exclusion of M, N, & P who are equally near; for D, L, F, G & H are of the whole blood of John who purchased the estate; & as has been before observed that stat gives the preference to the whole blood when they are equally near of kin.

17. The same case only Geo is living, distribute Black Acre as if of the Blood meant related to, & as if it meant lineally descended from.

Black Acre upon the supposition "of the blood" means related to, will be entirely George, who is one degree nearer of kin than either D, L, F, G or H. But on the assumption "of the Blood" means lineally descended from D, L, F, G & H they take the estate 1/5 each to the exclusion of Geo, who tho' he is a nearer degree of kinship to the intestate than those who take the estate, yet, cannot take it because he is not lineally descended from those from whom the estate came.

18th Solomon Stiles, John Stiles Grand Father is living. Distribute both estates; Black Acre upon the Hypothesis of the 17th Case.

Black Acre in this case, upon the presumption that "of the Blood" means related to, will be taken wholly by Solomon Stiles the Grand Father, he being the nearest kinsman of the ~~estate~~ Intestate who is related to Reuben. But upon the hypothesis "of the blood" means "lineally descended from" D, E, F, G & H the only lineal descendants of Reuben, take the estate to the exclusion of the Uncle Geo, & the Grand Father Solomon. The both of these are nearer relations than those who take the estate.

White Acre will be taken exclusively by Solomon Stiles, the Grand Father, as next of kin to the intestate.

19th Solomon Stiles is dead, but Humphry Stiles the Great Grand Father is living. Distribute Black Acre upon the same hypothesis as in the last case, & also distribute Black Acre upon the supposition, the propositus from whom the degrees of kindred are to be counted is J. S. the intestate. & also distribute upon the supposition that the propositus is Reuben Stiles. Distribute also ~~Reuben Stiles~~. White Acre.

Black Acre upon the Hypothesis of the Blood means related to: will be taken in equal portions by the great Grand Father Humphry & the Uncle Geo Stiles. Upon the Hypothesis of the Blood means lineally descended from, the estate will go to D 1/5 to E 1/5. to F 1/5 to G 1/5 & the remaining 1/5 to H. White Acre will go equally to Humphry & Geo Stiles, upon the supposition the propositus meant by the stat is John Stiles. So too it will go to the persons upon the supposition that the stat meant the ancestor from whom the estate came should be the propositus.

White Acre will go to Humphry & Geo Stiles

20th Humphry is dead & Geo is dead who left a Child Q. the relatives living are D, E, F, G, H, I, K, L, O, P & Q. Distribute Black Acre as if of the Blood meant lineally descendis from. On the first Hypothesis D, E, F, G, H & Q will take the estate in equal portions. On the second Q not being lineally descended from Reuben will be excluded & the estate will go in equal parts to D, E, F, G & H.

White Acre will go in six equal parts to D, E, F, G, H & Q to the exclusion of the Kindred of the half blood who stand in equal degree.

25th Reuben is living, but Tom, Sally, & Sam Stiles are dead without issue. Reuben on the hypothesis of the Blood means related to – will take the Estate. On the hypothesis it means linually descended from – the estate will [illegible]

26th The estate came from James Spinnell by devise, a person no windlated to the intestate, & the [illegible]tives are Reuben & Mary Stiles & John & Susan Rowe.

Reuben & Mary will take the estate to the exclusion of John & Susan Rowe on the principle that brothers & sisters of the half blood are to be postponed to parents when the estate is not ancestral.

27th Black Acre came by Deed of gift from Reuben; who is the only Relative of John Stiles deceased. Black Acre must therefore escheat. For Reuben is neither of [illegible] to or linually descended from himself, without one of which qualifications no person can take descendable Estate.

28th I find a way in the course of descents, whereby Reuben can take Black Acre which came from him to John Stiles by gift.

Black Acre may come to Reuben thro' any relation of John Stiles, who would be entitled to inherit the estate of John Stiles. Therefore [illegible] pose John Stiles to have died seised of Black Acre, which came from Reuben by gift, & that his relations living were his uncle Geo, & his father Reuben; then Geo will take the estate by descent from John; Geo then dies, leaving Reuben his only Relation who will now take the estate which he formerly ~~gave~~ gave his son John Stiles.

(1) The words "legal representatives" are not used but other words that amount to the same thing.
(2) This that it is observable provides for the father, brothers & sisters & children; but not for uncles & aunts further off.

Of the Stat of New York Respecting Descents.

All estates both real & personal in N.Y. goes in the Descending line exactly according to the Stat of Charles 2d.

When the intestate has no issue then the father in all cases takes all the estate of the intestate, excepting in one case which is when the estate came to the intestate through the maternal line, then it will go as if the father was dead.

If the father is dead, the brothers & sisters of the whole & half blood (as under the Stat of Ch. 2 respecting personal estate) in all cases succeed, unless in the case of ancestral estates when they do not succeed unless of the blood of the Ancestor from whom the estate came.

Here it will be proper to remark that the words "of the blood" have by stat been determined to mean related to.

The mother can never succeed to a childs estate, althó' the estate might have been derived from the maternal line.

Brothers & sisters children always inherit per stirpes, althó' all the original stock who would have inherited if are dead. In most other states they in such cases inherit per capita.

These are all the regulations specified in the Stat respecting descents; there is a general regulation however which directs that in all other cases, or rather in all remote degrees of kindred the estate shall go according to the by Common Law, regulating the descents of real estates. (1) 4) Stat of N.Y. 45

Distributions under the Stat of N.Y.

1st Case

1090

(1) In order to ascertain who is entitled to succeed to real property it is necessary to compute according to the Canon law, which is to begin at the common ancestor, & reckon downwards; & in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. — But in order to ascertain who is entitled to the administration of personal estate, or to a distributive share of it, ~~you~~ a computation must be made according to the Civil law which is to count upwards to the common ancestor & then down to the relation claiming.
2 Wilk Ch. 206.7.

Rules of Descent of Real property Under the English Common Law.

It is an old maxim in law that no person can inherit an estate excepting those who are of the blood of the first purchaser, & that in the feudal sense. The feudal idea or understanding of the words "of the blood" was, that the person having a right to succeed should be lineally descended from. A fiction of the law has been introduced which evades the rigour of this law. This fiction considers a newly acquired feud as one of indefinite antiquity. Therefore on the death of a purchaser his estate shall not escheat if he has no issue, provided he has any collateral kindred living, either of the paternal, or maternal line. But if the estate did in reality descend to the intestate, no person could inherit, except those who are of the blood of the purchaser, whether of the paternal or maternal line.

The ascending line are always excluded; the reason given for this by Lord Coke is, that it is contrary to the principle of gravitation, that heavy bodies should ascend. But altho' an estate can never directly ascend, yet it may collaterally; for instance, the uncle may succeed to a child, & upon his death, the father can be heir to the uncle.

Lineal Descendants to infinity exclude collaterals. And among descendants the eldest male, & his issue whether male or female exclude all others. If there are no males, nor their issue, then the females succeed equally, no right of primogeniture being allowed amongst them. The issue of females succeed per stirpes in all cases, whether the sisters be all dead or not, and this ad infinitum. For the rules of succeeding per capita which under certain circumstances prevails under the Stat. of Dis. is not known in the Common Law. But amongst the issue of females the right of primogeniture still prevails.

In failure of lineal descendants the nearest collateral relation is entitled to the estate. To determine who is the nearest collateral relation, we must resort to the canon method of computation. (1) ~~The nearest therefore is not directly always person the propositus to his brother who is the first degree.~~

All the rules before laid down as to the issue of the heir, the right of primogeniture &c prevail in collateral, as well as lineal descents.

With respect to collaterals there is another rule. By this the half blood of the person last seised, never can succeed to the estate it shall rather escheat. — But if the person from whom the estate last descended had not actual seisin of the lands, then the half brother, if of the whole blood of the person from whom the estate came, can succeed to the estate. For no person can transmit an estate by descent, without actual seisin, which the deceased had not. A mere right, without an actual seisin, has no effect upon the lands. And the half brothers claim has no reference or connection with his; but is wholly derived from his father, from whatever ancestor the estate came, he is of the whole blood of such ancestor.

If the brothers & sisters, & their issue are exhausted, the next relation are the uncles, & aunts, who are in the second degree, for from the father to the propositus (uncle, or the father) are two degrees.

If it is not known from whom the estate came, or it is a purchased estate, which is considered as one of indefinite antiquity, then the preference is always given to relations on the male side, ~~which is the same degree as those on the female.~~ If you run those out without finding any then resort must be had to the maternal line; in this case you exhaust the paternal line of the brother first &c

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DEVISES

The law of nature gives a man no dominion over his possessions except during his own life. They The right of Devising depends wholly upon positive law. The law of Eng & ~~Com~~ N.Y. gives a man this right to a certain degree. He can not perpetuate his estate but he may control it to a certain extent after his death, as by way of Executory devise, or by entailment before the practice of docking entailments was introduced.

Under the Roman law all persons who were in possession of real estate might devise it provided they were of sound memory. The Romans however would grant the estate under no restrictions, but conveyed an allodial estate or interest in the premises answering to the modern idea of fee simple. The practice of the Romans was communicated to our Saxon ancestors among whom the practice of devising was clearly prevalent. This practice except in a very few instances was entirely eradicated by the Norman conquest. The feodal regulations introduced by the Norman conquest being wholly inconsistent with the right of devising real estate. This right was not restored until the reign of Hen 8th when the power of devising was authorised by Stat. Subsequent to this Stat our ancestors emigrated to this Country, & brought with them all notions of devising real property that were derived from that Stat. They therefore continued the practice as of common law right, without any statute upon the subject. Subsequent to this ~~Stat~~ emigration the Stat of frauds & perjuries 29 Charles 2d was made, which made it necessary that a devise should be accompanied with certain solemnities, & have ascertained many requisites without which real property could not pass. This Stat being made subsequent to the emigration from Eng was considered as of no authority here. We therefore in this State & the neighboring States, have enacted a similar Stat. The Eng decisions therefore under this Stat are of as high authority, as any decisions whatever.

Our decisions in Eng. however fabricated upon one Stat
vary in some degree from those in Ry. As the
Shackles of alienation by devise continued much
longer than that by Deed, the power when it did
become free was diverted of those technical nicetie
which bind up & fetter the Latter. In alienation
by Devise the intention of the testator if it be great
contrary to law, is the proper rule to direct us in the construction
This alone is to guide in the construction of Devises
in whatever words ~~this intention~~ it is expressed.

That the Sylph was so long considered when
debarred the right of devising their lands was
owing to the lurking antipathy of the ecclesiastics,
who had invented the doctrine of uses, a thing which
was considered as distinct from the land. ~~It was~~
to devise of the use answered all the beneficial purposes
that a devise of the land would. But the Stat 27
Hen 8 by declaring the cestui que use should also
have the fee of the land wholly struck up the power
of devising uses. For after this Stat to devise the use
was to devise the land itself, and was properly was
not devisable according to the spirit & necessity of
the times.

The Stat 32 Hen 8. was enacted which
declared all persons not disqualified, having a sole
estate in fee simple, or seized in fee simple, in
Coparcenary, or in Common, of Lands, tenements, &
hereditaments might devise them.

The explanatory Stat of 34 Hen 8. makes no
new estate devisable, but adds some qualifications to those
of 32 Hen 8. and explains who are disqualified persons;
namely feme covert, persons within the age of 21 years,
idiots, & persons of non sane memory. It then goes
on to say that all wills & testaments made by any such
persons shall not be valid. No mention is made
in this Stat of joint tenants; they consequently
remain as at Comn Law undevisable.

The Stat 29 Ch 2. makes no ~~mention~~ new
property devisable, it only adds solemnities to the
Method of devising that which is made devisable by
Stat Hen 8. ~~Lastly property would be de in this~~
~~Country, but that which is made de in Eng, by the~~

(1) A Devise is a testamentary disposition of real property, or a conveyance of an estate to take effect on the death of the Donor. It differs from a will in that a will is a testamentary disposition of personal property merely, whereas a devise in strictness relates only to reality; the two terms however are often confounded. Pow D 13. Lovelap 182.

(2) So likewise a latter devise may modify & qualify what is given by a former & a legacy may take effect out of both, tho the former be revoked. As when A made a will & impliedly charged his realty with the payment of some legacies, & afterwards made another will revoking the former, & by the last one gave different sums to the same persons, but not executing his last according to the solemnities prescribed for conveying a charging lands, the lands under it might not have been charged, yet it being but a modification of the former will which was properly attested the lands were held charged. Pow Dev 9 2 Atk 268.

Ca Ch 58. 805. Co Lit 41.

1 Mod 117.

1 Show 545. 9. 553. 569.

Ca Ch 721. 1 Ves 187.
Cumb 174. 2 Bro 401.
Pow D 18. Co J. 691.
Co Ch. 24. 3 Mod 204.
2 Atk 592. Gilb Will, 415.

Co J. 144. 2 Mod 273.
Cro 530. 3 Bur 1775.
5 Term Rep 12

~~Stat Hen 8th had no Stat of our own making other property devisable in Con.~~ This Stat provides "That all persons of the age of 21 years, of right understanding & memory, whether excommunicated or otherwise, (not being otherwise legally incapable) shall have full authority & liberty to make their wills & testaments, of their lands, & other estates." As such persons may devise their "lands & other estates" by Stat, they may thereon devise their ~~lands~~ Joint Tenancies, & as the courts are not excepted in the Stat, they may devise their real property in Con, if they were permitted at Com Law.

In Consequence of the general terms of our Stat a man may devise the Remnant of an estate which he holds for the life of another. In by they have a Stat giving them this power. And when devising was confined by particular custom, before the Stat Hen 8th this estate was considered as devisable.

Under the Stat Hen 8 & before that of Chs it was settled that an instrument disposing of property ~~for~~ ~~or other~~ & without a valuable consideration was a will, tho' it were in the form of a Deed, provided it was not to operate till after the death of the maker. This idea has been forgotten up since the Stat of Chs. Therefore such an instrument to pass real property must have all the requisites of the Stat of Charles. (1)

Altho' the instrument be delivered before the death of the maker, yet if it be not to operate till after his death it is a will.

Tho a man has ever so many wills, yet if they are all consistent with each other, they will all stand & collectively be but one will. But if an after will be wholly inconsistent with the former one, the former is thereby revoked.

But if the latter will be only partially inconsistent with the former, the former is only so far revoked as it is inconsistent. As if A devises to B an estate in fee simple, & afterwards devises the same to C for life, then B's enjoyment of the estate during the life of C is inconsistent with the latter will, it is therefore so far revoked. (2) During the same period when the above rules were established, it was also determined that the will

(1) The reports ~~however~~ are from construction. The Judges however construed it in its most liberal sense. They even considered notes, letters & loose writings as sufficient. The following authorities will exemplify the extravagant length which this construction was carried to. Pow 345: 2 Wlk Com 376. Moor 177. Dyer 72. Pow D 125 - 1 Leon 79: 3 H 113. Pow 26. Co Ll 100. 2 Keb 345. 3 Co St 1 Shin 72. Pow 28. g. 3 Co 31. 1 Keb 880. Moor 556. 1. Sid 362. 1 Leon 79.

Pow 22: 2 Atk 273. 1 Voye 117.

2 Vey 242: 1 H 187 Pow D 232:

Under it one witness was deemed sufficient. Pow 31.

(2) When C devised all his real estate in trust for his son J, & if he should die without issue under age, then all his estate should go to C his heirs & assigns. C afterwards devised all his estate whereof he was seized in possession, remainder or reversion to V. V died in the life time of J, who afterwards died under 21. V without issue, & the question was whether the possibility given to J was devisable? & it was decided in the affirmative.

1 B 222. 2 T. Wlk Moor by Howard 1 P Wlk 263. 3 Leon 88. Leon 442. Pow D 34. 340. 427. Leon 291. Fonblanque 203. 209. 3 Ter 4 Term 248. 441.

(3) ~~Upon~~ Estates held pur auter vie cannot under this Act be devised, for it only contemplates those held in fee simple. 1 Rolle 594 Palm 32. Co Lit 41. Pow D 35. 7. Carter 208. 31 1 Pop 91. 2 Dyer 253. But by another stat it can be devised. 178

Ves 242. 171 - 187.

A right of entry on lands, depending on a condition to be performed by another person is not devisable: for the mortgagor may devise his equity of redemption, yet in that case the right of entry accrues, not by virtue of a performance or non performance of a condition by the mortgagee or any other person, but by the performance of a condition by the mortgagor. 1 Vezy 223. 422. Pow D 46. 183.

Pow 35. b. Co 281. 93. a 287. 400.

Might take effect by reference to another instrument mentioned, tho' not recited, and the instrument or ~~will~~ Deed thus referred to will be considered as part of the will. So tho' the instrument referred to is to be made afterwards, the rule is still the same; & when the instrument is made the will or devise will take effect.

The common method of altering a will is by a Codicil which must have all the requisites of a will.

The only requisites that the Stat of Hen 8th points out is that the will should be in writing & that the testator, provided he had an opportunity, should publish it. A will therefore of real property could never be by sing the Wrecna — conquest be by parole, except where particular customs, as in Kent, the right of devising Land has been continued. (1)

It was formerly considered that no contingent interest could be devised. It is now settled that they may provided they — clothed with an interest, and when the contingency happens, the estate will vest. What mere naked possibilities, as the expectancy of an heir, cannot be devised — (2)

Doubtless such an estate would be considered within the Stat, for it says "all other estates".

An estate for years & at will does not come within the definition of real property.

A Codicil is an addition to a will. The proper office of it is to enlarge, restrain, explain, alter or republish a will.

An estate which is termed "a mere right" is not devisable. As a reversion discontinued. So if a Tenant in Tail & a reversioner in fee join in conveying a life estate. The reversioner cannot devise his reversion, for it is discontinued. (3)

When the Stat of uses had annexed the property given to the use, & therefore uses no longer devisable, the Stat of wills enacted that all persons being seized in fee simple (except feme covert, infants, idiots & persons of non sane memory) might by will devise to any persons except to bodies corporate (unless it be to a Charitable use) two thirds of their lands, tenements & Hereditaments held by Knight service & the whole in socage. There has since been a Stat which has taken away the tenure by knight service, consequently all lands are ~~devisable~~ now devisable.

(1) Wills conveying personal ~~estate~~ must be made conformable to the laws of the country when the will is executed; for personal property is presumed ~~considered~~ in law to follow the person (a) 1 Blk 690. 1 And 25: 3 Dallas 370.

(2) These words do not extend to chattle interests Ill Rep in Ef 169. Pow D 55.

(3) A writing importing to be a devise if not good as such, is not effective as a deed, or an appointment under a power.

(a) It is also well settled that ~~for~~ the descent of personal property, is to be regulated according to the laws of the country, where the intestate was domiciled. 2 Blk 376: Pow D 47. 8.

2 P Wm 75.

2 P Wm 291. Pow 75.

2 Atk 152. 2 P Wm 158

1 P Wm 710 a 40.

1 P Wm 710 a 40

2 Atk 262. 205

Of the Stat 29th Car 2nd

The loose nps of the rule [illegible] the Stat of Hen, made a legislative interference necessary, to regulate the solemnities of wills. Thereupon the Stat of 29th Car 2d was enacted, by which it was provided "that bequests & devises of lands & tenements, devisable by Stat of Hen 8th or by particular custom shall be effectual, in writing signed by the testator himself or by one in his presence & by his express direction, & likewise be attested or subscribed by three or more credable witnesses in the presence of the testator".

Under the terms "bequests & devises", it has been determined that no form or set of words were necessary. Thereupon if a devise be in writing & have the other requisits of the Stat, it is sufficient.

Under the terms "Lands & Tenements" (1) a question arose whether ~~the requisitions of this new company~~ in a devise of lands & tenements which in any of the colonies of Eng it was necessary to execute the will according to the requisitions of this ~~Stat~~. It was determined that when the settlement of the Colony was antecedent to the Stat its regulations did not extend to it: when the settlement was subsequent it did. This decision was on the ground that colonies which migrated from Eng carried with them the English Law.

It was also made a question, whether when a will was made in a foreign country, with the requisits of that country, whether it would pass lands or tenements lying in Eng, it not being conformable to the Stat of Car 2d. It was determined it would not, tho' there had a similar decision in Con. (1) When one devises a trust estate, it must have all the requisits of the Stat of Car.

When one has had a power devised to him of disposing of lands, either by will or deed, he must if he dispose of them by will execute it with all the Stat requisits. (2)

So too the will that gives this power must have all the requisits of the Stat Car 2d.

So too lands devised to pay the debts of the testator, must have all the requisits of the Stat. (3)

So when a man devises a use charge, the Devise to be effectual must be executed according to the Stat.

So when a man has an equitable property some other having the legal, as an equity of redemption, the owner that pass it by will must execute it conformably to the Stat. Car.

(1) Upon instance the testator attempted [illegible] & failed, this presumption of the signing at the top being [illegible] as sufficient is rebutted. (a)

(a) Doug 241 or 129. 1 Hoff 180. Pow 65. 6

2. Sealing is not necessary ~~here~~ in N.Y. as in Eng the Customary. — Sealing is a feodal regulation, & obtained upon writing becoming common; They were at that time the distinguishing marks of families. Gilb R 20.

Doug [illegible] yet as Pow. 3 Mod 219. 3 Levins 1. Pow 60. 67. Stra 764. 1 Will 313. or 219. 1 Sy 60 or Hob.

(3) An acknowledgement of the will, without the signature is not sufficient. 2 Atk 182. (c)

(c) 2 Atk 182.

(4) The presumption being that a signing in the body of the instrument is sufficient, the onus probandi lies on the one who would impeach the will.

(5) The object of this part of the Stat is to prevent the frauds incident upon secret devises; as taking advantage of the testators infirmities.

1 Will 2 or 313.

(6) Proving that the test. wrote his name is not sufficient, the witnesses must swear that the ~~testr~~ Testator was sane & of a disposing mind. (b)

(b) 2 Atk 55. Bul NP 1 Atk R 365.

(7) A written declaration is sufficient to establish the point that he signed it with the [illegible] for they may presume it, but not with the court. Skin 227. Com 197. 3 PW 254.

Pow 60. 70. 2 Atk 56. Bul 264. 1 Atk 365. Sawy 122. Stra 1096.

(8) His testimony is analogous to the delivery of a deed.

Pow 60. 77. 80. 3 PW 93. 8 Viner 150.

(9) It is no longer law that a witness cannot be called to ~~prove~~ invalidate even a negotiable instrument which he has given credit to by his signature. 5 In 601 Ford ain vs Lashbrooke.

2 [illegible] 506. 2 Ves 455. 3 PW 253. 2 Atk 182. Dont 182. Or 6 or 154. Doug 272 or 244.

2 Atk 156. Pow 86. 7.

Under the terms that "It shall be ~~subscribed~~ signed", a number of decisions have been made. It has been determined when a man has his will thus "I John Stiles" without subscribing his name, that it was a signing within the Stat. The will in this case was in the hand of the testator, & under his seal. In this case some of the Judges contended that sealing was signing. They said that signing was a signum & that sealing was but a sigillum. This decision is settled law, it has been followed in the subsequent cases which have arisen relative to this point. The decision was made on the ground that the testator considered his name placed on the top of the will as a sufficient signing. But when the presumption that the Testator intended the signing at the top as a sufficient signing is rebutted the decision would be otherwise. (1)(4)

It was decided when a case came up by a will written by a third person, with the seal of the testator affixed, but without his subscribing it, that it was not a signing according to the directions of the Stat. & it is settled that sealing is not a signing. (2)

It is also required "That it should be attested & subscribed by three or more credible witnesses, in the presence of the testator". (5)

It is clear by this clause that the witnesses are to attest to the fact of signing by the testator.

It has also been holden that the witnesses ought to attest to the sanity of the testator. (6) This proposition if true would throw the burthen of proof upon the party (as it relates to the sanity of the testator) ~~upon~~ that wishes to invalidate the will. It would also prevent the witnesses from coming into Court & testifying to the insanity of the testator, because it would contradict their former attestation. (9) It cannot be true in practice (whatever may have been the intention of the legislature) that the witnesses attest to the sanity of the testator.

It is now settled law, tho' it was formerly held otherwise, that the witnesses need not have been present at the corporal act of signing by the testator; presence at the acknowledgement of the signature is sufficient. But nothing short of this will answer. (7)

Tho the Stat. Car. requires no publication of the will, yet it was argued that as the Stat. Hen. 8th did require it, it was still necessary, for the Stat. Car. made no express (8)

(1) If to "This is my last will". Swinburn 52. So when "Signed, sealed, published, & Delivered" was written over the place where the witnesses were to sign it was held sufficient publication. 4 Burns E L 114.

(2) If it is in several parts, one of which is attested, the other not seen, they are all void.

(3) If the testator is sick & the Curtains are Closed, still it is good. Salk 395.

So if the Test. is in a carriage & can look thro' the windows & see the witnesses subscribe in the house. 1 W Bl 647.

4 Burns Ecl Law 117.

D Mod 263. 1 Ly Raym 403. 2 Vern 179. 2 Blk R 407, 422. 454.

Salk 395. 608. 2 Blk Com 377. Carth 91. 1 Ly Raym 403.

Carth 79. Comb 156. 1 Show 99. Hobb 222. 2 Show 288. 2 Blk 377. Dory 232.

Dory 229 or 241. Pow 96.

requisites unnecessary but only added new ones thereto. The rule is now established that a publication is necessary. Mr Reeves however supposes the argument on which it is founded to have been fallacious; because tho' it was necessary to make the Stat 8 / then being so few requisites & solemnities attending devising, that there should be a publication to prevent fraud. Yet under the Stat Car whereby so many new regulations & requisites were made to prevent fraud, all danger of it he supposes is at an end without this act of publication.

No formal publication however is necessary. Any accidental conversation, in which the Testator declares the instrument to be his will, answers the rule. (1)

When one delivered his will in the form of a deed for the purpose of keeping his testamentary disposition a secret, it was holden to be a sufficient publication.

So when the testator called upon the witnesses to take notice, when he went to sign the will, it was held sufficient; & Mr Reeves supposes that when all the requisites & solemnities of the Stat are complied with, the Courts will always from infer a publication.

It has been determined that the whole will must be present at the subscription of the witnesses. That is is thus together the Jury may infer from the circumstance of the subscription. (2)

The subscription "must have been made within the presence of the presence of the testator" That is within his possible view; whether he actually saw the subscription or not, is immaterial. But if the witnesses subscribe in such a situation, that they cannot possibly be seen by the testator, the subscription is not well executed. (3)

But when the subscription was done in a clandestine manner for purpose of keeping the Testator in ignorance, it was held not to be well executed the within the possible view of the Testator.

An execution of the subscription in the mere corporal presence of the testator - ie - when stupified with sickness, or asleep, is not sufficient, there must be a sanity of mind, or a mental presence.

The witnesses who subscribe to the will must if its validity be questioned, swear to the subscription, being made in the corporal presence & to the sanity of mind of the Testator.

(1) This probate means such as are competent in point of age & understanding, such as are legal & not interested; & such as are not infamous.

(2) It has been holden that the subscription of the witnesses on three different sheets of the will, one on each, is sufficient. So it is at present. 3 Bur (a)

It has likewise been holden & is now that the subscription of witnesses on a blank cover, inclosing a will is sufficient. (b)

(3) If the codicil is added & attested legally & the Devise is not, the execution in the Cod is effective, if it appears probable that the execution of the Cod was intended for the execution of the whole. 1 Bur 554, 5.

(4) It has also been made a question whether a devise to an attesting witness is not absolutely void. The opinions are contradictory. Lord Mansfield says the witnesses devise is void ab initio. Lord Ld. Hardw. the devise is not void as to the other Devisees. Carth 544. 10 Mod 557. Cowp 1253. 1 Bur 428. Stra 1253. 10 Mod 557. Pow 122.3 Pow 129. 133. 5 Mac 516.

They may be introduced to swear agt the devise for this is against their interest. Stk 691 Pow 135.

So also a legatee who is a subscribing witness, provided it is immaterial to him whether the Devise is established or not. 1 Bur 427: Pow 135.

(5) This stat is adopted in the State of N Y by the Stat 180.

Cowp 531. 8 Vin 128. 2 Sty 1109.

(a) 3 Bur 1775. 2 Bla Com 377. Cro Ch 185. 270. Carth 37: 3 Mod 263.)

(b) Pow D 90.

Carth 38. 12 Mod 742. Comb 174. 3 Mod 262. 1 Show 68. Cro Ch 270. 2 Ven 597. Cowp 384. Pow 100. 1 Bur 554.5.

3 Mod 263. Cro Ch 184. 182. 2 Mod 177. 2 Ch Ca 104. 3 Bur 1775. 2 Ven 429. 1 P Wms 741 1 Hont 184. Pow 708. Pow D 113.

1 P Wms 741. Pow 708. 1 Will 216 Pow 70. 718. 1 Ves 177.

Ch Ca 184. 2 Mod 177. 3 Bur 1775: 2 Ven 429.

1 Bur 417.

Pow 113. Stra 1253. 1 Bur 414 on 17. 1 Ves 503. 2 Ves 374. 1 Hont 115. 61. Lofs 180.2: 1 Bur 427.8: 1 Pow 133. Doug 134.

(a) Vz - 25th Geo 2d

If a part of the witnesses are dead the survivors must swear to these facts. But they all being dead it is sufficient to prove the hand writing of the witnesses. This fact being established the Court will presume that the subscription was made in the presence of the Testator. The Stat requires "that there should be three credible witnesses". (1)(2) Under this clause it has been determined when a will was signed by two, and a codicil on a separate piece of paper by two. Now, that it was not well witnessed. ~~But~~ If the codicil had been on the same piece of paper it would not have been a matter of fact from which we might or might not according to the circumstances of the case, infer that there was three witnesses to the will. (3) But would still be void.

It has been determined that witnesses may subscribe at different times, & not in the presence of each other. Yet it is always most prudent to have them all present, for if one dies before the subscription was made in the absence of each other, the living witnesses testimony will not be sufficient to establish the will, nor can the hand writing of the Dead ones be proved, because they will not [illegible] the hand writing of Dead witnesses to be proved when there are living ones. Spectators may however be introduced to prove that it was sig[illegible] by the Dead witnesses in the presence of the Testator.

Courts of Chancery will not establish ~~the~~ such a will unless all the witnesses are produced; if some of them are dead good apparent it will make no difference.

The subscription of the witnesses proves it is said the corporal signing by the testator, but not the sanity of his mind, it will however be presumed that the testator was of sound mind till the contrary is proved.

The Stat of Car requires that there should be three or more credible witnesses. One Stat in Geo requires that there should be three or more witnesses without mentioning the word credible. The requisitions of both Stat amount to the same thing. In that there should be three or more witnesses competent.

(5) In by before Stat (a) which made ~~[illegible]~~ devises to witnesses void, & which gave creditors a capacity to witness a will, which charged the testators lands with his debts it was held that neither the creditors nor the legatees (4)

(1) A Devise without relinquishing is clearly an improper witness so far as it respects his own devise. For the rule that no man shall be allowed to testify in support of his own right is universal. (a)

Would a relinquishment at common law be sufficient to restore a witness's competency? In by Men has been some contention upon this point. It was held by one of the Judges, upon a trial, that such a witness could not be good at the time, & consequently was always bad. But this was merely his own opinion. This question was once tried in the Exchequer & the witness was admitted. (c) The same opinion was afterwards expressed by L. Hardwicke. (d) The same opinion was held in L. Hastings's case, in which all the witnesses had legacies which were charged on the land, by the L. Ch. (e) This point was also determined in another case. (f) ~~There is not the slightest doubt on~~ L. Mansfield's opinion was in favor of it. It is said the stat. was to reclaim men, but only of credit in Court — not a nullity of relation. L. Camden was of opinion that the witness was inadmissable. The same question has arisen in Cas, the Supreme Court decided for the admission ~~against it~~. The C. of Errors in ~~favor~~ against it. (Camp & Hadden)

(a) Com R 91. 4 Burns Ecc Law 93. Carth 514. L. Ra 12 Mod 277. 1 Inman 510: 2 Stra 1253

(b) 1 Ves 505. 2 Str 1253.

Carth 514. Stra 1253. 1 Mer 414.

(c) 1 Mer 414.

(d) 1 Ves 505: 2 Str 974.

(e) Cow 135: 6: 1 Mer 427. Pow 130

(f) Pow 130. Pow D 1 1. L Ray 730. Stra 1255. Carth 514.

(2) All persons here means all natural persons, not civil or artificial corporations. (h)

(h) 1 Rolle 608. Com 14.

(3) A full age is completed the day preceding the anniversary of our birth, for there is no fraction of a day in law. (i)

(i) Salk 44. 625. L Ray 400 1096. Pow 144. Ray 824)

(4) All persons other than convicts & those are not disqualified by the stat, may devise. Pow 139.

were competent witnesses, because of the interest they had in the establishment of the will. (A)

We have seen that in Com upon the subject & it has been made a question, as it was in Eng before the enaction of the above Statute whether a legatee could be [illegible] his incom money by a release of the legacy. The opinion of the Eng Judges upon this point, both in [illegible] & reputation stand equally balanced. In Con it has been decided by the Supreme Court, three to [illegible], that such a release would purge the incompetency of the legatee. This Jud.t was reversed by the Supreme Court of Errors. Nevis opinion is contrary to that of the Sp Ct &c; because, he says the legatee at the time of subscription is a competent witness, he having only a contingent interest, which never excludes, & therefore he supposes the legatee, although he becomes actually interested on the death of the testator, may by releasing that interest become a competent witness again. It is a rule at Com Law that a release by an intended witness restores [illegible] in of his interest. (I) see Cutts

A Disposition of real & personal when void as to real, is still good as to personal. [illegible] will often oppose the intention of the testator. (H)

Who may devise

(4) The Stat of wills says "that all persons not disqualified may devise" (J) This Stat therefore gives all persons who at Com mon Law were not disqualified from disposing of their property by will, the power of devising their lands. But subsequent Stat of 34 Hen 8, expressly excluded feme coverts, Infants, & Idiots & persons of non sane memory. It is clear therefore that in Eng a feme covert cannot dispose of her ~~personal~~ real property, if she were capable of devising devised property at Com Law. But as we have a particular Stat of our own upon the subject of devising, that of 34 Hen 8. cannot govern her. Conclusive evidence cannot be drawn from our Stat ~~upon~~ that a feme covert can devise, notwithstanding the words of it are general, & that she is not made an exception to the privilege as Infants, Idiots & persons of non sane memory. But her right will depend upon the reason of the case & the Common Law. ~~rules~~

In the feme coverts power of devising ~~was~~ fully treated upon under the head of Husband & wife.

(1) It is said that a person is not an idiot if he has any glimmering of reason. If for instance he can count an hundred, tell his parents. (a)

(2) Persons deaf, dumb, & blind are excluded this privilege, when so born. (b)

(3) If the owner of real property makes a devise of it whilst he is seized, afterwards is dispeized, but reenters & continues seized till his death, this is a good devise, for in judgement of law he is seized during the whole intervening space. Slk 238: 2 Vae 52: Pow 205.

If an owner of land is dispeized at the time of making a devise of the land, afterwards reenters & continues seized until his death, is this a good devise? Good Writers say it is, for the maxim is, if a man dispeized reenters, & continues seized, he is in judgement of law seized ab initio. Slk 238. 2 Vae 52. —

If a devisor devises property specifically described, which at the time of making the devise was not his, afterwards he purchases the property, is this a good devise? On this question the opinions are contradictory, the weight of opinion is, that it is not a good devise. All that can be said for the devise is that such was the devisors intention. But the intent of the devisor is not to govern in this case it being a rule of positive law. Plow 344. Holt 255 n 1. 243. Ed Ra 430. Slk 237.

A devise to a man of a mortgage of lands to be holden under a mortgage will not pass the equity of redemption, all that will pass is the chattle interest. 3 Ch Rp 99.

(a) Fitz N B 273.

(b) Co Lit 42: 1 Blk Co 364.

Cr Js 497. Dyer 128.b 6 Co 23. Dyer 72. Mon 760.

7 Ray 84. Plow 343. Dyer 143.b Ray 334. 7 Blk 106. 5 Cole 119.

As to the disqualification of "infancy & idiocy" nothing is to be observed, excepting that those who are objects of it are disqualified either from a presumed or actual want of discretion. (1)(2)

As to persons of "non sana memoria" the law does not consider them when making devises, as such, unless absolutely devoid of understanding, the law does not look upon them in the same light as when contracting. But the law requires that they should possess their mental perceptions, & that their judgment should not be debilitated, if they are it is a general rule that the devise will be void. Each particular case however must stand on its own footing, & be regulated by its own circumstances. For notwithstanding the testator might have been mentally debilitated, or in some degree deranged, yet if he make his ~~own~~ will equally to his former declarations & intentions, & not in a capricious or unjust manner, but as we presume he would have made it, had he enjoyed his faculties of mind in their most perfect state, the will, will be good.

~~A contract~~ A will ~~?~~ obtained by duress, or the apprehension of a restraint of liberty, or of great injury will be set aside; ~~but~~ & also if it was obtained by the teasing or importuning of a third person, or Devise.

It is a rule that if a person makes a devise, who at the time is incapacitated to devise, any removal of that incapacity afterwards will not make the will valid.

From this rule arises a strong presumption in favour of the right of a feme covert to devise. For when a feme covert made a devise of her "rationabilis pars" & survived her husband, that will was held a valid one. Now if a feme covert had been by coverture incapacitated to devise, an after removal of that incapacity by the death of the husband, will not make the will valid.

By a Devise of ones real estate, that real property which the Devisor is in possession at the time of making the Devise. But a will of personal property passes all, of which the testator is in possession at his death. Because of the fluctuating nature of personal, & because it cannot like real property be identified. (3)

2 Ph 631: 9 Mod 78.
Pr Ch 320. —

Lit Ke L 2 n 387.
Co Lit 185. a Perk sec 500.

1 Ly Cs Ab 172 n 102.
Pow 12. 175. 6.

3 Ch Rep 99.

Pl Ch 320: 9 Mod 78.
2 Vern 79. 2 Ph 631.
1 Ves 437. 494.

2 Ph 629. Pow 212.

2 Ch Cs 104.

When one has the equitable estate some other having the legal title, which the equitable owner is entitled to obtain, he may devise that estate. As when one is entitled by articles of agreement to the conveyance of an estate. A Devise of that estate, after the articles of agreement are entered into, either before or after the time in which it was to be conveyed, will pass the estate.

A Joint Tenant cannot Devise of his property held in J.T. The ~~Companion~~ Co-tenant claims by a superior title. The estate was created with this incident of survivorship. The Devisees claim is by virtue of a subsequent act. ~~[illegible] Devise. [illegible] Tenants & Copartners & Heirs in Common are prohibited to Devise.~~

No person Devise lands of which he is not seised or of which there is not an inception at the time of the Devise. The Devise of a mortgage of lands will not pass an equity of redemption which he may afterwards acquire. For the equity of redemption is considered ~~as~~ the legal title, or fee simple.

In our law, in bonnet, the words "having & seised" are omitted. It is a general principle in our law that possession is seisin, excepting when the owner is kept out by an adverse possession. For this reason possession is not necessary to support the gift. — In Con therefore an actual possession is not necessary at the inception of the devise. A person, on having a claim to land in Equity, may in Ch make a devise. For Chancery considers what ought to be done as done.

Even in Equity a Devise will not pass lands before the Agreement is made. If for instance the making a devise a [illegible] makes an agreement to purchase lands; these lands will not pass.

But if such lands are Devised to pay Debts it has been adjudged to be good in Chancery. This is clearly opposed to their rules of proceeding generally. It is but a mere obiter opinion.

xy. 24

Pow 220. 229.

3 Co 32 10 Co 81
Co 1359.
Co Ch 369. 1 Atk 619.

Lit Sec 505. Co Ch 865.
5 Coke 33b.
Co Lit 144. Pow 229.

2 Blk. Co 324. 2 Bulst 7.

2 Blk 109. 110. Plow 557

1 Vern 180: 1 Bro Ch 326.

~~3 Bulst 184~~ Pow 232.
3 Bulst 184.

Plow 154. 1 Blk R 222
1 Her B 33. 6 Co 281
293.

10 Co 78a. 2 Vern 621.
2 Ver 285. 8 Co – 81
Hob – 318.

2 Wms 181. 2. 4. 5. 192.
1 Ver 506. Hob 90.
3 Ver 488. 9.

What is Devisable.

As to the subject matter. The words in the by stat are "all lands tenements & hereditaments." from which words it has been held, that all lands not devisable by custom, are devisable under this stat. To devise a person must have a sufficient estate in the things devised.

Lands tenements, and hereditaments as are not valuable are not devisable, as franchises, ways &c.

Ways he thinks are not devisable here. Annuities he supposes are devisable here as well as in by for they are valuable.

Rents are devisable under the stat of Glen, & here being valuable.

An annuity in fee is devisable.

In by only estates in fee are devisable under their stat.

The words in our stat are lands & other estates.

An estate in fee tail cannot be devised. An estate pur autre vie may by the both here & in by. Chattle interests may be devised; there were devisable at Com Law.

Estates of fee simple are divided at Com Law into fee simple absolute, fee simple determinable, base fees, & fees conditionally at Com Law.

Since the stat De Donis 13 Ed 1. fees conditional at Com Law are turned into fee tail.

All the above estates of fee simple are devisable by stat Hen 8.

In that the term fee simple is used in its most general sense & includes every species.

Fee simples may be in possession or not.

Fee simples not in possession are Reversions, Contingent remainders, Executory Devises, Vested remainders, & Estates ~~subsequent~~ subject to a condition of Contingent remainders & Executory devises were formerly considered not devisable.

A reversion in fee is also devisable. Even on expectant on an estate tail.

A remainder expectant on an estate tail is devisable. It is not deemed a remote property. So far from it, it is considered vested.

(1) Nothing decisive is to be found in the books. But Goulds supposes the Cases to be that a tenant of a term for years might devise it; not that it could be created de novo.

1 Leon 24.

2 Vern 478: 1 Leon 257.
Powell 109.

3 Bul 184. Pow 232.

Pow 237: 8 Leon

1 Rolle Rep. Co Lit 111.

10 Co 97.8. Co Ca 57.
Salk 231.

Pow 230. 9. 250: 10 Co 78.

Plowd 95. 1 Sid 285.
Cro Eliz 29. 55. 84. 1 Lev 144.

10 Coke 78.

2 Bl. 374. Pow 6. 243.

Dyer 126.b 378.

Salk 164. Pow 246.
1 Vern 573. 340.
1 Ves - 420 Salk 165.

In Lon the two last rules of Devising Remainders & Reversions expectant on an estate tail do not prevail. For it cannot here exist. We have no reversions existing after an estate tail in Com; for the estate becomes vested in fee absolute in the issue of the Devisee.

Estates in fee may be legal or Equitable. Both are devisable.

A person who is entitled to a trust estate may devise it.

The term fee simple is used in its most general sense & includes every species

A Tenant in fee simple may devise any kind of fee that can be conveyed.

A Tenant in fee simple may carve out any estate. And this not other in possession, remainder, or reversion.

A Devise after a fee simple or upon it is not good, according to the old rule at Com Law.

This relates to Devises considered as a disposition of property in possession ~~not for them~~ of be devises.

As to Precatory Devises & remainders, they have been hitherto treated of.

A Tenant in fee may Devise to one for life & another in fee. The fee Tenant does not acquire from the tenant for life, but from the Devisor.

When a Devisee disposes of a less estate than he has, he may devise other estates out of it.

It follows from this that a testator may by devise create a chattle interest, & this De novo.

A term for years might be Devised at Com Law. But can it be property be created De novo at Com Law or in other words could such an estate be created out of a fee?

Estates created by Devise may be absolute or conditional. Instance – An estate for life is an absolute one; one upon condition that the Devisee ~~will~~ pays rent is conditional.

The condition may be precedent or subsequent. There are no technical words to distinguish these two estates. The words must be taken from their natural import.

9 Mk 375. Pow 8. 236.
270. 271. 278.

4 Co 4.

Pop 4. 2 Vent 207.
2 Ld Raym 75.
Popham 4.

2 Mk Co 235. 6. 285.

2 Mk Co 235. 6. 1 Salk 383.
5 Mod 63. Pow D 283.

1 Atk 501. 2 Ves 323.

Dyer 76b Co El 670.
741. 74. 734. Yelv 73.

Co Lit 113. 9 Roll 930.

Co Lit 113. 1 Roll 930
Co Ch 382. Mow 776.
Hary ~~note~~ Co Lit 113 note 2?
189. note 3.

Co Lit 113. 236. 256. 4 65.

Co Lit 448.

Devises are legal or equitable. If Devise of lands for the use of another since the stat of uses is a legal estate. If lands are devised to one & nothing is said about a use it cannot be construed a use.

If an estate is devised to one for the use of another, the use is executed in the Cestuy que use.

If a use is limited for the life of the Devisee he does not have it la. fee, it reverts to the Devisor.

An Equity may be devised thro' persons called a Trust. A Trust estate is an estate given to one in trust for another.

Trusts are nothing more than a revival of uses. If it was termed uses it would be united with the legal estate. They are therefore uses not executed by the stat of uses.

The substantial difference therefore between uses & trusts is, that uses include legal estates under the stat of uses. Trusts do not.

When are trusts executed, & trusts not executed When the trustees are directed to convey the legal estate, then it is executory. - When they are not it is executed. This is but a verbal distinction however, they are both equitable estates.

If one Devises of property to another to convey to a third, It is not an authority to sell or to lease it for years, If he attempts this nothing will pass by his acts.

But if the Devisee orders his Executor to sell he may. Co. Lit 113.

Devisable ~~estates~~ powers are again divided into naked authorities & those coupled with an interest.

A naked power is a bare right to convey or dispose no interest being here devised to the one who takes. As when one Devises that his Ex shall sell his lands. Co Lit 113. 1 Ratle 330. Cr Ch 202

When the authority is a naked one, the land remains in the heir till executed. Co Lit 1

A release of the right of a man who has but a naked authority, conveys no right.

It is a rule in the execution of this & every other power, that it must be strictly pursued.

2 Ze 241.

Zent. 44. Dyer 177.
1 And 145.

Zent 44 Dyer 177
1 And 145.

Moor 61. Colly 26
Dyer 176.b 219.a Co Lit 113.a
Moor 341.

2 Leon 220. Dyer 371.
1 Leon 30. 1 Atk 420.
1 Ver 200. 1 Leo 304.
Pow D 299.

Dyer 371. 2 Leon 220.

Pow D 300.

Pow D 303.

1 Inst 235.a 264
Co Lit 236 b.

Cro El 256. Hob 285.
Hutton 36. 1 Ver 200.

1 Cro El 98. Dyer 210.

The disposition made of a power, must be made with reference to the instrument giving the power.

Such a power is strictly personal & cannot be conveyed. It was given upon personal confidence.

If a power of this description is devised to two persons, even if they are executors, & one dies, the other cannot sell the land. Then the Ex takes their power not as Ex but as individuals.

For the same reason the power does not survive to the Ex of the Executor; tho it will to the powers are as Executors.

This rule is so strictly construed, that were a power is devised to Executors & the Executors of those executors, That the Executor of one of them and the survivor cannot execute the power.

When a testator directs "That land shall be sold" It is questionable whether the Ex or the heir shall sell it. Good thinks that if the Proceeds are to be apart in the hand of the Executor, that it is the Ex business to sell it. If not it is the heir. — —

Where it is the business of the Executors to sell, no person being appointed, the surviving executors may dispose of it, for this is a duty incumbent upon them as executors.

If persons who are appointed to execute a trust refuse, Chancery will compel them. If they died, Chancery will appoint others.

When an authority is coupled with an interest ~~is not a bare authority, but an interest in the Devisee~~. as if A Devise to F an estate to be sold by him, ~~in one of this devise~~ ~~Where a Devise is coupled with an interest~~, the Devisee, & not the heir shall have it, 'till executed. ~~or compelled to execute it~~

The Devisee will also have the estate 'till the expiration of the time ~~which~~ he was to hold it, ~~or~~ tho the object is answered before. As if it should be devised in trust for an heir 'till he arrived at twenty one, & he died before. Yet the trustee will hold it till he would have been twenty one, altho the object was that he should hold it as a support for the heir. — A naked devises interest ceases the moment the object is answered.

1 Zu 432. 2 Vern 513.
1 Pn 149. 1 Mk 309.

8 Zu 118. 2 Hl Wh 136.
2 Bl Gh 297. 1 Mk 558.

3 Mill 516 Coup 39

5 Zu 49. 50. 1 Pn 50 11.904.
486: 3 Mill 5.
Ow 534. Vernon 2171
1 Day 35.

Of Construction of powers.

It has been decided that under a limitation to of a power or trust to one to ~~Devise~~ convey to such child & children as B shall appoint, an appointment to one is good. "And" is here construed disjunctively.

It has also been Decided that a power to Devise is not executed by a residuary Devise. As having a Devise in trust with power to Devise to his children. A Devise of all his estate to his son B, after payment of his Debts, funeral charges &c is not good. He does not here specify any particular estate which he has in trust.

Revocations

There is a wide difference between the law as it stood in Eng respecting Revocations at Common Law, & as it now stands; they have a Stat regulating devises in this particular. We have no Stat in Con on the subject, it therefore becomes necessary to be acquainted with the Com Law, which governs in this State as to revocations.

Revocations are of two kinds, express & implied.

Implied Revocations

Implied revocations still stand in Eng as at Com. Law, as their Stat only operates upon express revocations.

Implied revocations are derived from an alteration of circumstances, subsequent to the execution of the devise, which impel the mind to a belief, that the intention of the testator had been altered. As when a bachelor made his will giving all his estate to a stranger & afterwards married, & had a child; this alteration of circumstances was holden to revoke the will. The circumstances were such as to impose a belief upon the mind, that he had altered his intention.

Upon this principle of an alteration of intention our Legislature in Con has enacted, that if a man devise to his three children his whole estate & die leaving his wife "enseint" of a female child, this fact will amount to a revocation of the will. Stat Con

1 Rolle 615

Co J. 115. 497.
Co Ch 51. 874.

3 Will 54. Hard 374.
1 Show 55. 1 Ves 32.
170. 186. B & C 344.
3 Will 411. 2 Mod 206
Comp 90. Pow 543.
Co Ll 921.

3 Will 297. Comp 87.
Brow Parl Cas 344.
2 Ball & Beatty 937.

Pow 546.

An express revocation was at common law effectual whether by parole or in writing. There has been no decision in Connecticut whether a parole revocation would be valid, but it has been decided that a parole republication is not valid which was at Com. Law. And it would be in analogy to this decision that our Courts would determine a parole revocation void.

The parole revocation at Com. Law must be made "animo revocandi" or it will be of no effect. A slight inconsiderate words of the Testator will amount to a revocation. —

Neither will any expression of a fact or intention to work amount to a revocation, the thing must be actually done.

There is a general rule that a second will, inconsistent with a former one revokes the former by implication. This rule must be understood with some qualification. If a devise in a second will carve a less estate out of that in which he has given in a former to another person, it only amounts to a revocation "pro tanto". For instance - If a devise to B his farm in fee simple, & in a second will devise it to B for life. The last will operates only so far as it is inconsistent therewith. Consequently after C has enjoyed the estate for life, B will take it in fee simple. But if the second will give away the whole of any particular estate that was given in the first will it amounts to a revocation of the ~~whole~~ so far as it regards that property will. As if the devise in the first will give both black acre & ~~might~~ White to A, & in the second give white acre to B. The second will amount to a total revocation of the will so far as it respects white acre, but black acre will still be validly devised. That if a revocation be effected by a second will it must always appear in evidence that the second will differed from the first & the particulars also in which it differed. If a second Will is made under a false impression as to fact, the first is not thereby revoked, for the second in such a case will be of no effect. But when a second will is made under a false impression as to matter of fact Law, the first is thereby revoked.

4 Bro 2512.

Comyn 49.50.

Doug – Rodgers Cobbis

4 Co 64: 20 Vn 624
2 Wlk 499: Plow 243.
2 Ld 684: 689. 700.
contra 4 Bro 2512
per Counsel.

When a second will by implication revokes the former, the former one is revived by a destruction of the latter by the testator.

Thus if the first Will had been expressly revoked a destruction of the revoking instrument will not revive the first. If a man makes a will & then cancel & tear it, & then make another, which he destroys, the first will is not revived tho it be not torn or cancelled but that it is legible. So without any second devise, a source of implied revocations is an alteration of circumstances subsequent to the execution of the will, from which we cannot but presume, that the testators intention was altered, but that this negligence, or some other means besides want of ~~consideration~~ of intention, no express alteration in the will was made. Nothing however, according to the decisions of the courts has raised this presumption, but a subsequent marriage & birth of a child, & notwithstanding this subsequent marriage & birth, still the will is not revoked, provided it is such as you can suppose the testator would have made after this alteration of circumstances, & provided it is such as after this alteration be reasonable for him to make.

As all these cases of revocations from a subsequent alteration of circumstances go on the ground that the testator had altered his intention or would have altered it if he had known all the existing circumstances or facts, there will therefore be no revocation when the presumption is rebutted. It would seem that upon principle courts would consider a will revoked from many other alterations than that of a subsequent marriage & birth of a child; as in many other cases an alteration of the testator's intention might well be presumed, but according to the decisions no other alterations will effect this revocation.

If a feme ~~sole~~ sole makes a will & marry her marriage does not operate as a revocation but as a suspension of the Will during coverture, therefore if she dies before her husband, her will is thereby rendered ineffectual. But if her death is subsequent to that of her husband the validity of the will is restor

Moor 429. Pop 108.
1 Vern 178. 9 Mod 190.
3 Will 316. Moor 429.
Rolle 614. B.C.R. 450.
3 Atk 72. 10 Mod 190.

9 Mod 92.

2 Ch Ca 153.

3 Lev 108.

An intended alteration by the Devisor in the estate devised, is another source of implied revocation. An actual alteration always revokes the will. An intended alteration will revoke the will provided it appears to have been the intention of the Devisor that there should be such an alteration. As when he attempts to alter it & fails in the attempt, either through the informalities of the conveyance, or the incapacity of the grantee to take. Had however an alteration of facts, if it be clear that the devisor intended to convey, the will is by the attempt revoked, because it appears clear that the intention of the Devisor was to take it from the Devisee.

All these cases of implied revocations from an intended alteration go on the ground of a presumption that the Devisor intended to take the estate from the Devisee. This presumption is a fair one, but wants it seems (& Mr Rees so supposes) a qualification to this effect. If the Devisor intended to take the estate from the Devisee, provided the grantee did not take it. But we cannot with any certainty infer that he intended to take it away from the Devisee or any other ground than that of the grantee taking it. And Mr Rees thinks as the question is not settled in Con, it will admit of dispute.

Implied revocations from an actual alteration of the estate, arise whether the testator intended to take it from the Devisee or not. Such cases depending in by merely on positive rules the intention of the testator being not at all regarded. Mr R— doubts very much whether our courts would be guided by the by decisions on this point but rather suppose the intention here as in other cases would guide. 1 Rolle 616. 8 Co 90. 1 Show 92. The by principles have been carried to such absurd lengths that it has been decided, where a man conveyed his estate to another to the use of himself, it was a revocation of a devise of that estate which he had previously made; the it was since the Statute of uses, which made such conveyances mere nullities. 2 PW 163.

So it has been decided where a man devised his estate tail, & then docked the entailment so that the devise might take effect, that the altering the estate from a fee tail to a fee was a revocation of the will. 3 Lev 108

So it has been decided, where a man covenanted to do a fine entailments for the purpose of giving effect to devises which he intended to make & then made the devises, that the docking

1639

1 Pitman 614
3 Atk 803.

3 Pitt 171. 2 Ven 677.

Dney 240.

9 Rolle 616. 378.

1 Rolle 617: 9 Ven. 329.
1 Salk 158: 3 Atk 748.
664 Dney 968.

these entailments according to covenant for the express purpose of giving effect to the devises was a revocation of them.

So when a man devised his estate in fee simple, which afterwards he supposing he holds in fee tail, & therefore goes thro' the ceremony of docking an entailment for the purpose of giving effect to the devise, it has been holden that such an attempt was a revocation; tho' in fact the devisee had a fee simple the whole time. 3 PW 170. 1 Rolle 614. 3 Atk 803.

Equity however have in some measure done away the mischief of this rule; for whenever the estate is of such a nature that it does not fall within the jurisdiction or bounds of Law, Chancery will, if it has cognizance of the case, determine, inter alia it will appear to be the intention of the testator that the devisee should not take the estate, that the alterations are not intended for a revocation of the will. As where one devises an equitable estate, & then acquires the legal title. That the devisee takes the equitable estate in the [illegible] revocation of the devise [illegible] is. — The partition of a Joint Tenancy, is no revocation of a devise of a Joint Tenants estate.

Implied Revocations also arise from the maxim that no man's estate can pass by devise of which he was not seised at the time of his death. This by maxim is founded on their stat. But notwithstanding the devisee be disseised, yet if he recover before he dies, the Law considers him as if he had all along been seised, & in such case there will be no revocation of the will. —

In how this law is not regarded, we have considered an ownership as amounting to possession, therefore a disseisin of the devisee is no revocation of the will.

Neither has it been so considered in by other the devise was fraudulent, for the purpose of preventing the devisee from taking under the will.

A Mortgage of the devised premises by the devisee was formerly considered a total revocation, but now since the fee has been considered as remaining in the mortgagor, it is considered as a revocation only pro tanto.

If the alteration was not of the entire estate, it was never considered a total revocation of a Devise of that estate. As where it was mortgaged for forty years it was formerly considered, that such a Mortgage worked the will, for forty years. But it is now established that the Devisee by paying

1 Rolle 616. Cf 49.

2 Atk 272: 10 W 343.

Comp 52. P W 346.
3 Will 500.

the mortgaged money, may immediately entitle himself to the estate.

When an estate devised is put into the hands of a trustee for the purpose of raising a sum of money for the payment of debts, the surplus of the money raised, after payment of debts, will go to the devisee.

An abridgement of an estate devised is only a revocation pro tanto. As if the estate devised to A in fee be leased to B for forty years.

Express Revocations

In by the Stat of revocations provides that no devise is revocable otherwise than by some other will or codicil in writing expressly declaring the revocation or by some other writing signed in the presence of three witnesses. Or by tearing, cancelling, burning, obliterating. Seems therefore under this Stat that express revocations may be made either of these three ways, in either of which a devise might have been revoked at Com Law, for the Stat gives no new method of revocation, it only confirms the Com Law method of express revocation to the above mentioned. But this Stat is but not to affect the Com Law as it respects implied revocations. This stat is adopted in the State of N Y Page 178

1 Under this Stat a devise may be revoked by another will or codicil expressly declaring a revocation. By another will or codicil is meant an after disposing will or codicil. It is settled that where a revocation is attempted by a disposing will; that to effectuate a revocation the disposing will must have all the requisites of the Stat Car 2.

2 Under this Stat a will may be revoked by another writing than an after will or codicil. But such writing must be signed by the testator in the presence of three witnesses, & is called a revoking will. No after ceremony is requisite to render it effectual, 2 Atk 272: 10 W 348.

3. The last method prescribed by this Stat, by which a revocation may be effected is burning, tearing, cancelling or obliterating. Under this clause will be included, almost every method of revocation by acts in pais which the imagination can conceive of. The mere act of burning, tearing, cancelling or obliterating a will, unless it be rendered so illegible, that its contents cannot be determined, is no revocation. To constitute a revocation, the act in pais, must have been done, animo revocandi.

11 13

2 Bl. 1043.

10 N 343.

Cro El 490. 1 Ph 275.
Com R 301. 1 Bray 407.
3 Atk 176.

9 Mod 70.

But however slight the acts be done, if they are actually done animo revocandi they effectuate a revocation.

There is however an exception to the last rule, for the act be done animo revocandi they do not effectuate a revocation if it be done under a false impression as to facts, without which it would not have been done.

Republications

A will that has been once revoked may be republished, & rendered valid; or by republishing one that has never been revoked it may be made to operate much more extensively than it otherwise would.

A will of personal property if in general terms passes all a man has at the time of his death. But a devise, however general the terms of it, will pass only such real estate as the devisor was in possession of at the time of its execution. But by a republication of the will it may be made to operate upon, & pass all the estate, which the devisor was in possession of at the date of the republication; provided the words of the Will, will embrace all the estate.

It is a rule with regard to republications, that they speak from the date of the republication, that is, the will republished has the same operation, as if it had been made on the day of the republication.

A republication also takes in subsequent persons as well as estates, where the words of the Will, will embrace such persons.

A republication from a nature can be of no effect, where the devise is wholly of specific bequests. Neither will a devise of specified personal property, pass any other than that specified.

To the rule that a Will of personal property in general terms passes all the personal property which he was possessed of at his death, there is an exception. Such chattels real only, as the testator was in possession of ~~at the testator~~ ~~at his death~~ the execution of the will pass thereby.

At Com Law Republications might be by parol but since the Stat of Car. it has been determined that a will must have all the requisites of that Stat, as its effect is a testamentary disposition of real estate. It has likewise been determined in Con that a republication to be effectual must be in writing.

Republications may also be implied, as when a working will is destroyed, the will that was thereby revoked

1 Mk 599. Stratton
586.

9 Gen 485. 1 Nat or
Gen 554

Coll 341 to 351.

is by the destruction of the revoking instrument implicitly revived, or republished.

It has been made a question whether a codicil added to a will, implied a republication; it seems always to have been holden, if the codicil were annexed to the will, it implied a ~~revocation~~ republication. And the law seems now settled, that it is a republication tho it be not annexed, tho' the ~~will~~ codicil is of personal property, yet if it be executed according to the Stat Car it is the better opinion, that it implies a republication. All these cases go upon the ground that the testator at the time of executing the codicil, contemplated the will to which it was added, as his then existing present will.

It has been endeavoured to extend the influence of republications by codicils, so as to render valid wills, which were not so at their inception. It seems that in this particular the following distinction has become settled Law. Viz That wherever a devisor has done all he intended to do to a will, but has still left it imperfect & not executed according to the Stat Car, that it cannot be rendered of any effect by a Codicil. But if all had not been done to it which the testator intended, he might by the addition of a Codicil, or rather by an addition to the will render it valid.

Of Devising powers

By construction of the Stat of Wills it is settled, that one person may devise to another a power either to sell or devise his lands. It seemed to follow of necessity that a man by might of course devise his land for the payment of debts & legacies. The right of devising powers was first disputed in Ly A man in Car has also the right of devising a power over his estate. This power devised cannot after the death of the testator be revoked.

The law distinguishes powers thus devised into two kinds, tho in point of principle there seems to be no difference between them.

1 When a man devises to another a power to sell or devise his lands, the devisee is said to be vested with a mere naked power to do the act for which he is authorised. But in the mean time he has no interest at all in the estate but it rests in the heir, who will be entitled to the rents

Co Lit 113. 236. 265.
Co Jr 382. Cowp 464.

Co ll 26.

5 Co 60. 2 Mu 90
2 PM 316: 4 Co 4
Plowd 45:

& profits thereof, & is the person to maintain an action against the trespasser. And such trustee of a naked power is not compellable to execute; but if he does not execute Chancery will step in & appoint an executor of the trust, on the principle that a trust shall never fail, because of a deficit of the Executor a trustee.

2 When a man devises his lands to and has to sell or devise; The power of the trustee is said to be coupled with the interest. The estate vests in the devisee, who must take the rents & profits thereof in trust, & may maintain an action against a trespasser. And such trustee of a power coupled with an interest, is compellable in Chancery to execute it.

The power which a man has in consequence of such devise, whether it be a power or coupled with an interest is fiduciary a personal, & on the death of the trustee does not go to his Executor, therefore that the trust may not fail, Chancery in such a case must appoint a person to execute it.

So when there are more than one trustee of the power, on the death of one the other cannot execute it, but some person must be appointed for this purpose by Chancery.

But when a man had three executors, & devised a power to them in the following words "I devise to my Executors, &c" It was holden on the death of one of them, that the other two might execute it, because they might do it in strict conformity to the words of the Devise.

When a man devises land to be sold without appointing a trustee, the heir to whom the land vests, it has been determined, is compellable by Chancery to sell the Estate.

Parole Evidence

It is a principle, that the parole declarations of the testator may not be let in to contradict or vary his will; but parole testimony may yet be adduced to show that the Drawer of the will did not execute it according to the intention of the testator.

It is a general rule, that parole evidence is not admissable, to vary enlarge, or diminish a will. As when an estate is devised to a man & his heirs, parole proof cannot be admitted to show that the testator meant the

1185.

Mem B 105: 6. 6. 16
1 Sh Ch 274.
1 Bro Pa Ch 100.

2 Vez 216.

5 Co 60: 2 PW 137: 1 Vez 231.
6 Mod 199: 2 PW 136: 1 Pa 674.
9 Mod 240.

4 Salk 234: 1 Ba Ch 472.

1 Vez 231. Salk 240.

2 Ven 252. 3.
2 Bur 426.

word heirs as a word of purchase, whereby the children of the Devisee might take as purchasers under the will with their father. But it will be construed, that the testator used the term merely to denote the quantity of interest which he intended the devisee should take in the estate devised. Nevertheless on the death of the Devisee, before the devise, his heirs could not take. But in Con our legislature in this last session passed an act whereby the heirs in such case are entitled to take what the father would have done, on the ground the testator used the term as a word of purchase.

Whenever there is a patent ambiguity ie arising from the face of the will, it is a general rule it may not be explained away, or reduced to a certainty by parole testimony. To this rule there are some exceptions; for where the ambiguity arises from the use of an equivocal word parole proof is admissible to ascertain in what sense the term was used by the testator; especially parole proof as to facts which tend to explain away the ambiguity may be admitted.

But parole proof is never admissible to explain away ambiguity arising from the face of the will; because of a different construction which may be given a sentence, not from any equivocality of a term used but from the disposition of the sentence.

But when the ambiguity is latent ie – dehors the will arising from external circumstances, it may always be explained away by parole proof.

It also seems from the adjudged cases that by giving a will its plain & obvious construction an absurdity is enforced upon you, you may give the will a different construction. And to show that the plain & obvious construction would be absurd, you may resort to parole testimony.

But when the ambiguity is. But parole proof is in no case to be admitted however the ambiguity may arise, provided it will not stand well with Will. ie If it contradicts the will it is never to be admitted

It is a rule that parole testimony may always be admitted to relate in equity, or court an explication of law. ie. an equitable construction of a writing a will may be reduced to the legal construction by parole proof. But parole proof is never admitted to reduce a legal, to an equitable construction.

3 H 17: 3 Bro 6 350.
9 P W 270: 2 W K 324:424
10 P W 540: 2 Zy 183.

Dr 6 h 34.

There is a question now agitated before the national Courts of the United States, which seems to have been a long time settled in Eng. Whether a will of both personal & real property, shall pass the personal, it having sufficient requisites for that purpose, when it cannot pass the real, it not having sufficient requisites of a Devise of real property. In Eng the question is settled in the affirmative. I never very much doubted whether the Eng rule is founded in principle. For the principle which is to guide is the intention of the Testator, & he supposes the intention of the testator was, that the personal property should pass only upon the condition that the real also passed. As when he devised all his real estate to his younger, & all his personal to the elder son. Then it cannot be supposed the testator intended to disinherit the younger son, therefore he intended the elder should take the personal only upon the condition the younger took the real estate. Whatever the Eng precedents may be, our courts are not bound by them, when they contradict the principle which they have adopted.

It is a general rule that Courts of Equity will not interpose to set aside Wills obtained by fraud. This at first appears absurd, when we recollect that when there is fraud in the consideration of a Deed Chancery will set it aside. The reason of the difference is this, deeds for a fraud in the consideration are not at law void, therefore they require the interposition of Chancery. But a will obtained by fraud is void at law, & a Jury when they find fraud in a will ought to find no will. Therefore the interposition of Chancery is unnecessary in case of a Will obtained by fraud.

It seems however notwithstanding the principle, "that Chancery will not interpose to set aside a will obtained by fraud" in certain cases they have for this reason set aside the will. Dr Ch. 123: 2 Ver 699: 1 D H 741.

So Chy. will consistently with the principle that they cannot set aside wills for fraud, compel the performance of a promise, in consideration of which the will was made differently from what it otherwise would have been.

1152

10 M 741.

1 L. Ult 365.

Mode of proving Wills of Real Prop.

To prove a Will of Real Property one of the witnesses who subscribed it is sufficient. For he can swear to his own subscription & to that of his fellow witnesses, & also to the signing of the Testator.

From the fact that one witness can prove a will arises a conclusive argument against the idea that it is necessary the subscribing witnesses should attest to the sanity of the Testator. For if that were true one witness could never prove the will. For tho he could attest to his own opinion & that of his fellow witnesses, yet it would be impossible for him to attest to their opinion of the testator's sanity.

Notes

(I) Grotius opinion is that such a witness ought to be admitted to testify; for it is an acknowledged principle of Com Law, that a release by an interested witness restores his capacity. Pow D 121. 2 Ray 730.

One objection is that at the time of attestation a devisee is subject to bias, but this objection holds equally in every other case, & no harm is done until he is called upon to testify; besides this is a provision of the Stat of frauds, which Stat was made for the purpose of regulating evidence in Courts, not the mode of effecting out of Court.

It is again objected that if such testimony was allowed, it would furnish temptations to bribery. This objection would equally apply in all cases, & the Com Law regulations must of course be done away. But the Com Law regulation is admitted upon all hands to be good law.

It is said the capacity relates to the time of attestation. But the reason of this rule is, that a child or a lunatic cannot attest to the corporeal act, for he is supposed in law to have no mind; if he should swear therefore, he would in legal contemplation perjure himself. The term "competent witness" is a term of art & means that the witness is admissable to swear to ~~the~~ a fact. But it is said they must be competent when they are offered as a witness to attest. If this is ~~sufficient~~ the case, it is sufficient if the witness at the time of attestation is competent to write his name. But if the word is used in the Com Law sense he must be competent at the time of of coming into Court, & such a competency is sufficient.

But further it has long been a question whether a devise to an attesting witness is not in itself ab initio void?. On this question there has been no decision in Eng, but the books are contrary; Lord Hardwicke conceived it to be void ab initio; Lord Lee conceived all devises under such an instrument to be void. Carth 514: 1 PW 557. Stra 1253: 1 Bur 428. But this question is settled in Eng by Stat 25 H 8 c 2 which provides that devises to attesting witnesses are void as to such devises. Also that creditors shall be good witnesses to devises charging lands for the payment of debts. In Con there is no such Stat. Pow D 122.3.

This Stat does not propose to introduce any new law, being only declaratory of what the law was. We have therefore the opinion of the British Parliament, that such a devise is void, & that a devisee may testify. Pow D 129. 138: 5 Bac 576

Our Court of Errors however have decided that such a Devise is not void.

1166

1487.

Michael Wood — By Ogden Edwards late Judge,
Dec 14th 1845.

Of Alienation by Deed

The general methods of acquiring property are by Descent & by purchase.

Under the denomination of purchase are included the methods of alienating by Devise, Alienation by Deed, & by Execution.

The method of Alienating by devise, has been already treated of.

Anciently feuds were not descendable or alienable. It was esteemed inconsistent with the feodal regulations. The great men distributed the lands to their tenants to be holden by them as a reward for their service, either at will, years, or for life. It was a principle then as well as now, that a deed must be construed most strongly the grantor, therefore when an estate was granted to a man simply then "an estate" it was construed to mean an estate for life, for this was the greatest estate that could then be granted. Estates were descendable much before they were alienable. To convey a descendable estate the words "heirs" was used; tho the word has since & is now used to signify that it is ~~indescendable~~ absolute estate. Not long after they became descendable, they became alienable to a certain ~~extent~~ extent. The first stat upon this subject is that of 1st Rot long after this if a man had an estate granted to a man & his ~~heirs~~ assigns, he might alienate it. This is the origin of the word "assigns" in a deed, which now is of no import, for a deed is as efficacious, without as with it. —

The crusades to the Holy Land gave rise to a power of disposing of one fourth of descendable estates, and of all those which came by purchase: — There was no stat. allowing this, but it was connived at & crept in by tacit assent. The Stat. 1 Hen 3d allowed them to sell a reasonable part, which was construed to mean one half. By the Stat of Edward 1st full power was given to alien all estates, excepting those that were held of the King as his tenants, and even such might upon paying The Stat of Chs 2d took away this power. The power of devising was of later origin, it was introduced by Stat of Hen 8th

Plow 88.

Co Lit 304. 214.

Power Contracts.

Who may alien

This head will be but cursorily treated upon, having before been taken notice of ~~upon the~~ under the head of contracts.

Infants, Married women, persons of non sane memory, Idiots are excluded from this power.

If a man holds adverse possession (not merely in committing a trespass) but contends the title, it cannot be aliened, ~~such~~ an attempt would be void. But a conveyance to the adverse possessor would be good. The reason of this rule is to prevent peoples ~~being~~ stirring law suits. These conveyances are void upon principles of Com Law. Statutes have now been made which do nothing further than to add penalties. ~~The~~ A Stat of Hen 8th in by specifies these penalties. It is a crime also at Common Law, & where the ~~statutes have~~ Stat cannot be taken advantage of by reason of the Stat of limitations, Courts will fine at Com Law. Those Statutes were merely accumulative.

The words used by Coke is his notes on Littleton are these, that "no man shall sell a pretended title" This means a disputed title, whether the title sold under such circumstances, it is a crime whether disputed or not. These rules do not extend to remainders & reversions, a man may sell these, for the possession of the particular tenant is considered the possession of both.

Lunatics & persons of non sane memory, are not permitted to alienate. If they do the heirs after their death may avoid it. Whether the lunatic can is made a question. It is said in the books that a man shall not stultify himself. In Chancery it is set aside in the name of the Crown, the King being considered the guardian of all Lunatics. And so at Law by a Sim ferias. — In Connecticut it has been decided that a Lunatic is not bound.

An Infants Deed is not binding. He may treat it as if it did not exist. ~~How far it is void~~ When it is void, & when voidable, may be ~~called~~ determined Judge Reeve thinks ~~from~~ by the following rule. When treating it as voidable would not interfere with the infants

1771

4 Mm between 1800
& 1900 found in

1 H Pt. Compton
by Collection. 334

infantile rights, then it is void as; otherwise it is void. The privilege of an infant is to rescind his contracts at pleasure.

It is ~~likewise~~ a rule that no grant is good till assented to. It might more properly be said till dissented from. It is said in the books that assent is presumed when it is not expressed. But this presumption cannot be admitted with reason in many cases, as when the donee is an infant, or a fool.

Feme Covert are another class who labour under disabilities. By levying a fine or common recovery feme coverts can grant in fee. In Law we have no such judicial proceedings as a fine or common recovery; but they may then convey by joining with her husband in the conveyance. In the neighbouring states she goes before a magistrate & acknowledges that she made the conveyance free from control.

If she conveys by fine or common recovery it will not bind ~~if~~ the husband if he did not join, but it will be binding upon the wife & her heirs. The reason given is because he is her lord, but it would be more proper to say because it would interfere with his marital rights.

Why cannot she convey to commence after the husbands death. In by they have a maxim which forbids it, viz That a man cannot convey a fee to commence in future. — In Law we have not adopted this maxim; Judge Reeve therefore knows of no reason why it cannot.

A feme Covert is as capable of purchasing as any other person; but her purchases may be defeated by the dissent of the husband. Nor is the wife bound by any contracts which she makes during coverture, if she chuses not to be after. After coverture she may dissent to them.

Deaf & Dumb is another ground for peoples not being bound by their contracts. Such contracts however are not void but voidable.

An Alien born cannot Alienate. The Com Law doctrine is that an Alien can never purchase so as to hold, consequently he cannot alienate. It goes immediately to the King. An Alien can so far receive however

1173.

The following are cited for the above Rules
Co Lit 35. 2 Roll 21.
Co Lit 22 a.

as Next it will pass out of the alienor. An alien friend may take a lease of houses &c for the purpose of encouraging Merchandize; but not long leases

If an alien purchases & is not disturbed during his life time, his children if born within the realm may inherit it.

Papists till a late period could not hold property of real nature & consequently cannot convey, in England.

Reason in another ground for the exclusion of this privilege in Eng but not in this Country.

Of Deeds

The alienation of real property must always be by a deed.

A Deed is a contract reduced to writing or printed, on paper or parchment, and signed, sealed & delivered. It must be written either on paper or parchment, ~~or~~ ~~signing~~ wood or stone will not answer.

No freehold can be conveyed unless by Deed with these requisites.

Formerly in Eng this conveyances were all by parole; this was the Com Law practice. The solemnity was called Livery of Seisin; the form was by the delivery of twig & turf in the presence of witnesses, with a declaration of the extent of the land meant to be conveyed. — If they were afraid to enter, they might deliver it at a distance. — To this succeeded a method of delivering the twig & turf in the presence of witnesses with a deed describing the boundaries of the land. — To this succeeded the present method of conveying by Deed only.

This method does not owe its origin to Statute. The first Stat made upon the subject was the Stat of frauds & perjuries, which required that all contracts respecting lands should be in writing & signed.

Sealing originated in the ignorance of ancient times, when the art of writing was but little known. Seals were made use of as the distinguishing marks of families. It has been always customary in Eng to seal it, & is probably an indispensable requisite there.

The Stat does not require such thing, and Judge K. apprehends that it is not necessary.

A Delivery is another requisite to the validity of a Deed.

Co Lit 36. 2 Roll 24.

2 Roll 25.

Co Ll 834. 884. 520
Co 137. Mun 697.

Delivery is necessary to show the assent of the grantor to the passing of the land.

That it was signed, sealed & delivered, must be proved by parol. Its being in writing & on paper or parchment appears from the inspection of the Deed itself.

Altho the deed may import to be signed, sealed, and delivered, yet it may be proved otherwise.

If any person see it handed over, this is evidence of delivery, even tho' nothing be said; or if the purchaser takes it up after paying his money or giving his note, tho nothing be said. — The fact also of a man having a Deed & delivering it for record, is presumptive evidence of delivery.

There is such a thing as delivering a Deed as an escrow — that is to have it become the act & Deed of the grantor, upon the happening of some contingency. It is usually delivered to a third person. The condition is parol.

There has been much dispute whether a Deed may not be delivered to the intended alienee as an escrow? If at the time a man delivers a Deed the validity of it depends upon a concurrent act, then Judge Kent apprehends it will be considered an escrow; but if it depends upon a future contingency, it is absolute. If we admit this distinction we shall be supported by the authorities, if any other we shall find them contradictory. In this case the estate rests upon parol testimony.

In Con it is required by Stat that there should be two subscribing witnesses, & acknowledged before some Magistrate.

In Ly neither of these are requisite; it is however customary there to have the witnesses sign.

If a person at the time of delivering the Deed has no personal incapacity, but afterwards obtains a capacity & redelivers it, this Deed altho' made & executed at a time when the party was incompetent, will be effective, & from the time of the first delivery. Persons incapacitated are Feme Coverts, Lunatics &c. —

But when there is no personal incapacity, but merely an impidement, as would be the case when a person was displaced at the time he would sign, and after the impidement is removed, he makes another delivery, it will not be good.

Co Lit 40. Co Rep 46.
9 Co 35.

When a Deed is delivered as an escrow, the rule is reversed. If a person under a personal incapacity delivers it, & after it is removed redelivers it, it is not good. — But if such person was only under an impediment, a redelivery after it was removed, would be good. — These rules are altogether arbitrary, without any reason to support them.

Neither a Date nor witnesses are necessary under the Ky Law.

Pr Con the three following requisites are necessary to the validity of a Deed.

1 It must be signed by two witnesses.

2 It must be acknowledged before a magistrate.

3 It must be recorded. (Altho' this is required yet a deed is effectual against the alienor without this requisite. But if the grantor sells it to another, who at the time of purchase is ignorant of the first sale, & he gets his deed first recorded it is good against the original purchaser.

The object of this last requisite is to prevent purchasers being deceived.

The alienee must have a reasonable time to get his deed recorded in.

If A sells to B, who keeps the Deed an unreasonable length of time, & another knowing this purchases, can he hold it? It has been determined in Ky that he shall not hold. This idea is also fully recognized by our courts.

Creditors, who are ignorant of a former sale may take unrecorded Land by execution. But when creditors take they cannot hold, even against the Debtor, without conforming with all the requisites of the stat, one of which is that it should be recorded at the County Court. Title to land by execution, is a creature of the stat, & when the stat gives a right all the requisites of it must be strictly complied with.

Requisits of a Deed.

To every Deed there must be a Grantor, a Grantee & a Thing Granted.

There must also be a consideration, either good or valuable in its nature.

Good Considerations are those that are founded on natural love & affection. If the grantor stood in Loco Parentis to the grantee the estate conveyed would be considered as founded on natural love & affection, altho there was no relationship in blood. The old idea is that in no other conveyance is a Deed founded on a good consideration without relationship.

Marriage is a valuable consideration.

A good consideration merely will not entitle a man to hold against creditors.

The above rule however is not universally true. If there was no intention of fraud at the time, & there was negligence on the part of the creditor, as if he should long neglect to lay in his demands, he cannot defeat such conveyance.

All considerations as to the turpitude may be enquired into by parole evidence.

Altho' the consideration is illegal yet it is good in the grantor against the grantee; but not against creditors. The words of the Stat are that it is void against such creditors as it was intended to defraud. But it is void against all.

A voluntary conveyance is void against any antecedent creditors, but not against any subsequent.

The Stat of Eliz inflicts penalties upon men who make fraudulent conveyances. This statute however was merely accumulative. —

The following question has been much agitated & is still undetermined. viz. If A conveys to B fraudulently, to defraud his creditors, and C purchases of B, can C hold against the creditors? —

It is said that authorities can be produced to shew that the purchaser hold.

Judge Reeves thinks the purchaser can not hold against the creditors.

Both parties to this contest reason much from analogy. Those who contend for the purchaser say that there are cases where *bona fide* creditors can hold, when the alienor cannot. The conveyance of an alienor, who has given a previous deed, is good, provided the first purchaser has not had his deed recorded. A Man may also ~~hold~~ sell what he does not own in market overt. Also if a seller of goods keeps them in his possession, the seller may alienate them to another person who will hold them.

On the other side they reason from analogy thus. If the seller stole them, he cannot alienate so that the purchaser can hold. — The law of the market overt is upon principle of policy. If a man assigns a fraudulent bond, still it is not good. The equity of the cases is nearly ballanced. —

From this it appears that the reasoning from analogies is nearly ballanced in point of force; we must therefore look further for something to preponderate the ballance.

In hearing that you should be proceed in construing it as to advance the remedy, & avoid the mischief contemplated. The intent of the Stat of Eliz (which is merely in affirmation of the Common Law) was to guard creditors against fraudulent conveyances, & its provisions, by their debtors. If the construction is admitted which will allow fraudulent aliens thus to alienate the object of the Stat is defeated. For such persons will always find some person to whom they will alienate, & thus obtain the end whilst the Stat avoids present. — Against this reason it is affirmed, that no mischief accrues further from suffering the fraudulent to hold than if he did not; because the debtor himself could alienate, without the aid of a third person; and if A could sell, why not B, for B stands in A's shoes? But when A sells the land, he is in possession of all the proceeds, consequently is as able to satisfy his creditors as when the land remains in his possession. In the other case the land is gone, & there is no equivalent, ~~can~~ No proceeds can be brought against B. in the case where he sells. — It is moreover contended that injustice will be done to C, so will it to A's creditors who are prior in tempore. —

If an action can be brought against B, for the proceeds when he sells, then the force of these arguments are gone.

But how can such an action be supported? There may & probably will be many creditors, and to a much greater amount than the value of the land. When therefore a number sues, who are to have the preference? The law knows of no average. If there is no average the first in suing have the preference, & the others go without their remedy. Moreover an action for money had & received cannot be maintained.

Judge Reeves thinks the object of the Stat was to vest the property in the creditors, the moment it was conveyed fraudulently. —

If the obligations were made payable to A he knows of no reason why it will not be effective.

A voluntary conveyance is void, when a subsequent purchaser would be defrauded by considering otherwise.

Voluntary conveyances do not furnish presumptive grounds of fraud.

If a deed of land is given without any consideration, it is of no effect, the land does not pass thereby, but it inures to the use of the grantor. — Judge Reeves does not apprehend that they mean that the deed is void by this. It vests a legal title in the grantee. Chancery however would either compel the grantee to reconvey, or would order him to account for the rents & profits. —

Why may not a man give away his real, as well as his personal property? The History of the times when this idea originated solves the question. The Court of Chancery was set up, & enforced these conveyances, as conveyances for uses, at the time of the violent contests between the houses of Lancaster & York. At this time the ruling party uniformly confiscated the property of the opposite partizans for treason, as they obtained the superiority. It then became customary to convey it to others, when a person was about engaging in the contest. Consequently it was highly reasonable at that time to consider them as conveyances for the use of the grantor, their being no intention of making a gift.

But by they have a Stat, called the Stat of uses, that immediately vests the legal title in the person who has the equitable one.

1155

(1) When there was no consideration expressed, it lies on the grantee to prove that there was one.

If a consideration was expressed, it anciently made no difference in voluntary conveyances. Since the Stat of frauds & perjuries it will. Till that time parol proof might be introduced to prove no consideration. — But if a consideration is expressed it is presumptive evidence that there was one, otherwise not.

Judge Reeves thinks that the principles of the Com Law will allow a voluntary grantee to hold; and that it would be now so considered was it not for the particular state of the times when it was introduced. — He moreover thinks that Ch will allow the presumption of trusts to be rebutted.

When a consideration was intended, and was expressed, but it so happens that there was none in fact, such a deed ought not to prevail. — This is not similar with the case when none was intended; for then the gift was intended. It is said however that when a consideration was expressed, & there was none in fact, that you cannot get at it, for parole proof, cannot be introduced to contradict a writing. But if a consideration was expressed, which was no consideration, or was one on the face of it but none in fact, the consideration expressed failing, then parole proof may be introduced to this effect. As if A should in a deed express the consideration to be a certain farm, & it should appear that there was no such farm, this may be proved.

The <u>inadequacy</u> of a consideration may also be proved. But you cannot prove that there was none.

When a consideration is expressed, & nothing more is said it is difficult to get at the truth if there was none in fact. (1)

If however the transaction was of such a nature that it appears from written documents entered into at the time, that there was no consideration at all, the conveyance will be set aside. When a consideration was intended the ceremony of sealing does not impeach one

There is no difficulty to prove a fact by parole, that gives effect to a deed, or a fact that stands well with the deed. Therefore you may prove a consideration when none is expressed

A consideration is good, however small. — It is said that the very <u>sealing</u> <u>any instrument</u> imports a consideration. But this is not true with respect to Deeds. In Bonds it is not customary to state a

(1) If there is a voluntary conveyance of real property, it cannot be touched by creditors, if there is other property sufficient to pay the debts.

Plow Co 1 to 230.

2 Co. 3. g: 11 Co 28.

11 Co 27. 1 Roll Ab 40. — Co Ll 626

2 Leo 35.

Roll R 2 Co 48.

consideration. Judge Reeves does not think that the reason of a Bond being binding is the sealing. But that the terms of the Deed — promising to pay implies a Debtedness & consequently a consideration. —
If the sealing was a consideration it would be fully inforced in Law in the case of covenants as well as in Bonds. for the smallness of the consideration is a matter of no consequence in Law; but Law will only give nominal damages, & Chancery none at all. See Powell on Considerations. (1)

Another requisit to a deed is, that it must be read & truly if requested, to an illiterate or blind man. It is necessary to read it to a person who can read it himself.

The want of recording does not voidate a Deed, but matter Ex post facto.

All other requisits are absolutely necessary or the Deed will be considered void ab initio

Ex post facto occurances will avoid deeds.

Erasure will avoid a Deed.

An alteration either in a material or immaterial part made by the obligee will voidate a Deed.
The reason of immaterial alterations voidating a deed is this, viz to prevent tampering.

If a stranger alters a deed, ~~either~~ in a material part, without the assent of the obligee, it is void. But an immaterial alteration by a stranger does not voidate a Deed.

If the obligor alters it, he is still bound: & parole proof may be introduced to establish the Deed as it was at first.

If it was altered by the consent of both parties, was a Deed that is required to be proved by two subscribing witnesses, you cannot prove it to be as it appears: For it was different when the other witnesses subscribed. But if other witnesses subscribe to the alteration, then it is good. — In the first case the old deed will be good as proved.

If the seal is off it is not good according to the Eng Idea; but when it was cut off by the Nisi after it was introduced in court, then it is good.

If the seal is necessary at all in this country, Judge B. thinks it would be effective tho the seal was torn off.

A voluntary conveyance will be good against the first alienee if his deed was not recorded. But if it should happen that the alienor could not indemnify the first alienee, the property would be liable for his Debt.

There are certain grants good to pass land in law, which are not sufficient in Chancery. Fraud in the consideration of a deed does not vitiate it in Law; but Chancery will consider it as bad. Till lately this was our practice; but now law will not enforce such conveyances as Chancery will rescind.

Dumps, and fraud in the execution, as if he signs one thing supposing he signs another &c these are void at Law.

Many deeds besides the above are void in Chancery viz. those obtained by undue advantage; as where a woman would not consent to a young man having her daughter without he would acquit her from accounting for the estate of the daughter which he had made use of. — Chancery relieve for reasons founded on sound policy of this description are Marriage brokage bonds; & agreements for purchasing the expectancies of young heirs.

Covenants

Deeds of land usually contain covenants.

The grantor usually covenants that he is seised. This is called a covenant of seisin.

Also that he will defend; this is called a covenant of warranty. This is that he will defend the premises.

Quit Claim Deeds are those which do not contain any ~~warranty~~ covenant.

Before the covenant of warranty ~~be~~ can be resorted to, the party must be ejected.

Altho the grantee may have been molested, yet if he retains the land, the covenant of warranty is not broken, unless he covenants against unlawful challenges.

The grantee must be noticed to whom he conveys by warranty, that he may come in & defend. If the grantee after this does not chuse to defend, the grantee must go on & make the best defence he can, and then if he is defeated he may come upon the grantor. If the grantor is not noticed, & the grantee is defeated, the grantor will be permitted to contest the grantees demand, & if he can show a title the grantee will not recover. As to the rule of Damages ~~the~~ see title of Covenants.

The best way of noticing is by sending a person to the party & making him leave a copy of a notice.

1 Vent 176. 347.
2 Levinz 26. 92.
1 Rolle 520.

1 Rolle 1 H 521.
5 Co R – 17.
Co Lit – 385.
1 Ten rog: 3 Ler 326. 1 Mod 31.
2 Saund 371.

It has been made a question whether the consideration money can be recovered in a quit claim deed? He thinks the reason of their being no authorities is, because there are no quit claim deeds given in by when there ought to be a recovery of the consideration. —
When it was a bargain of Hazard, Judge N— apprehends, & the parties both understand it so, then the alienee cannot recover. But when it is no bargain of hazard, the full price being given, then he supposes it can be recovered. —
The proper action for such a recovery is Indebitatus Assumpsit, for money had & received for the pltff use.

The law with respect to these covenants is different from others, upon the grantors death. When the breach of the covenant is in the life of the Covenantor the he may sue, if after the heir. The covenant runs with the Land, till broken.

If it was a covenant of seisin the breach if at all must have happened at the moment the covenant was made, it will consequently go to the he.

If in a case of a Lease, the Lessee repairs during the life of the Lessor, the covenant being that he should repair, and not after, then the right of suing goes to the heir.

A Covenant of warranty is to a man, his heirs & assigns. The assigns is not expressed, yet they may sue the warantor.

The law is the same with respect to leases.

It is the same whether assigns is expressed or not.

If the covenantor die, is the heir or executor to be sued. If the covenant is broken by the heir, then the he cannot be sued, but the heir must alone be answerable. But in all other cases the he as well as the heir, where the heir is mentioned are both liable.

Judge Reeves thinks that the heir could not be sued in Con.. For the heir has no property till all the Debts are paid, excepting where the breach arose after the settlement. Then he supposes he ought to sue all the heirs, or else the heirs who are sued should have a writ of contribution against the others. And this has been done in Con.

In personal contracts, excepting in one case, the heir cannot be sued. This one case is where the Debt has not become due at the time of the testators death, & the h. the bondsmen before it becomes due are bankrupts.

(1) Not if an underlease is made even for a day less than the whole term, the underlessee is not liable for rent or covenants to the original lessor, like an assignee of the whole term.

In all cases where the ~~lessee~~ assignee is bound, the lessee is not released, but the assignment furnishes an additional security to the lessor. 5 Co 16. 24. 457. 552.

(2) If a person leases lands for an aggregate sum, or takes notes for the rent this is a personal fund.

(3) In instance, the term "Land" conveys whatever adheres to the soil, as houses, fences, emblements, rents not accrued &c

Exceptions must be in writing, for parole exceptions will not avail.

An exception is wholly void when the whole of a thing is excepted. 2 Rolle 454. Hob 170 i.e. Coke 106

5 Co 16.

Co Lit 47. 4 Mod 11.

2 Rolle 454. Hob 170
10 Co - 106.

Co Lit 47.

There are cases where the assignee will be bound by a covenant, & cases where he will not.

Sometimes it makes a difference whether the assignee was mentioned or not.

If the lessee covenant for something that relates to the lease, & has existence at the time the assignment was made, the assignee is bound tho' not named. E.g. If it covenants to repair & does not, the assignee carries the covenant, & binds the assignee. Also if it covenants to pay an annual rent, & assigns, the lessee is bound. For these are covenants that relate to the land, & have existence at the time of the assignment.

But if the covenant was about something that has no reference to the lease, but no existence at the time, then the assignees are not bound unless named. As if he was to build a wall within six years, & sells before that period arrives. But altho' he is not bound if the assignment was made after the expiration of the time. As would be the case if the six years had expired before the assignment.

If the covenant is to do a collateral thing which has no relation to the land, then the assignee is in no case bound. (1) Annual rents are upon a quite different footing from almost any thing else. The rent is considered as coming in lieu of the land itself. Or it may be said to be turning the real into personal property. All which accrues after the testators death goes to his heir. (2) Of Exceptions

There are certain technical terms which convey the whole emblements, rents not accrued &c unless they are excepted. The lessee has the same remedy for the rents as the assignor. (3)

If a house is elevated on rollers for the purpose of removal, he thinks it will not pass as land.

If emblements &c are excepted, the exception implies a right of ingress, & egress for the purpose of attending to them.

If a man leaves all his lands in a certain place excepting those by descent, & he has no other, all his lands then altho' by descent will pass. So if a man conveys or leaves all his lands in such a place but white acre, if he has no other, white acre will pass. In every grant to be construed most strongly against the grantor. If a man grants twenty acres of land, saving one, the saving is void.

(1) The mode of conveying by bargain & sale was, A Contracted to convey land to B for a valuable consideration — in this case A was considered as being seised to the use of B & being so seised & so considered, the Stat of Uses immediately conveyed to him the legal title. This gave B a complete title. However to make this a complete title, it was ordered to be enrolled within six months, to avoid which they introduced the mode of conveying by lease & release.

Co Lit 6: 2 No 5
Yelv 193.

Lease & Release.

The mode of passing land by lease & release was, A sold his farm to B for one year, by this B was seised, & being in possession A then released to B: for where one is in possession a title may be obtained by release. Yoy Doubted of the soundness of this Decision, he said that the lessee was not seised of the land out of the term. But is now fully established.

Of the Deed itself

What we call the Date is only the evidence of the time when delivered, it furnishes a presumption to that effect till the contrary is proved. The Date in fact, is the time of the Delivery. The Date may be proved to be contrary from what is expressed. Parole proof may always be introduced to show the time when a Deed was delivered, & consequently the Date.

There are but two ways of conveying practised at present. Viz Bargain & Sale — and Lease & Release.

There were formerly many more methods in use. viz

1st By feoffment. Which was by Livery of seisin; and afterwards by Deed.

2d Gift. This was a conveyance of entailed estates. 3d Grant. Which was used in conveying incorporeal hereditaments.

4th Lease. This is now as much known as ever. The words usually used in conveying a Lease are Lease, demised & farm Let. But now any one will do of the words.

5th Exchange. This is entirely out of use. This was a mode of exchanging estates.

6th Partition. The common form is the one now in use. It is made use of by coparceners, & Tenants in Common. They convey to each other the parts that each are seized.

These Conveyances are what are called original conveyances. Besides these there are others that are called Derivative Conveyances, such as Lease & Release — Deed of Confirmation & Assignment are not now in use.

The two principal methods now in use are by Bargain & Sale, & by Lease & Release. These two methods are derived from the Statute of uses. To understand them perfectly it will be necessary to attend to the Statute of uses, & the history of it. This is fully treated upon in Blackstons Commentaries.

Of Bargain & Sale

One method of conveying by Deed is the most simple that can be conceived of, being merely by Bargain & Sale like that of personal property.

From the doctrine of Uses arose the method of conveying called Bargain & Sale. (1)

Title by Execution

For the English law upon this subject see Blackstone's Commentaries.

The following rules are upon the law in Con upon this subject.

Lands are now liable to be taken in the life time of the debtor sub modo:

Lands cannot now be taken if other property is tendered. They are not secured however by a tender of the Debtors person; Nor can the goods be secured by a tender of his person; but the body can be secured by a tender of the person, this the form of the execution imports otherwise.

To gain a title to lands by Execution, there must first be a demand; if no personal property is tendered to secure it then either the body or land may be taken at pleasure.

In proceeding under an Execution the creditor must act reasonably. To take the dwelling house & garden, when there is other land; or to take such a piece of land as would greatly prejudice the other, would be considered as unreasonable.

If the personal property, & Land are not sufficient the creditor may then take the body.

Judge R. questions whether the officer is obliged to take the crops growing in preference to the body. The method that crops ought to be taken is by a levari facias.

The lands taken to obtain a complete title, must be appraised off by three freeholders who belong to the County where the land lies. The State lands are lands in the limits. The three freeholders are chosen one by the Debtor, one by the creditor, & one by the magistrate. The execution must be lodged in the town Clerks office, also at the office of the County Clerks, then the title is complete. If the execution was issued by a Justice it must be returned to him.

What is to be done with the Debtors entailed estates, or estates for life? If practice has silently grown up among us to introduce the principle of the Stat of Eliz as Common Law; for it is in Con a principle that all a mans property is liable for his debts. We therefore extend it; which is done by three, instead of twelve men & the Sheriff. But a life estate cannot be extended longer than for the life of the tenant for life — & the remainder due on the execution may be recovered against the heir by a scire facias.

Whether this extension is a fragment or only a security

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remains a question. The general opinion I have apprehends is, that the Creditor has an interest in it for the time it is extended.

It has been determined that the Shff could not sell a life estate to third persons, but that it must be extended to the Creditor as other lands. Have thinks such a tenant would be restrained from committing waste.

A term for years cannot be ~~be~~ sold, but it being a case not taken notice of by the Stat, must be extended.

After a Debtors Death in Com a mans real as well as personal property becomes assets in the hands of the Ex for the payment of Debts. But real property is not in the hands of the Ex except for the payment of Debts, for if trespass is committed on the land the heir is ~~liable~~ entitled to the action.

If there are not sufficient personal assets to satisfy the Debts the Ex obtains an order from Probate for the ~~pay~~ sale of the lands. The lands are not thereafter levyed upon as in the life of time of the Debtor.

An Execution Debt as such is no better than any other debt.

A question has arisen whether a creditor who has levyed on the land can hold it after the Debtors death. I for N_ I suppose he has got a sufficient lien on the land to hold it. The bankrupt laws of the United States has originated a question somewhat similar. If a bankrupts goods are levyed upon does this estate go into the hands of the Commissioners? The execution in the case determined on was levyed on before the enacting of the bankrupt law, in which case the Court were of opinion that the creditor held it. When persons sue to recover the title to the land itself, the process is the same as in Ej— viz Ejectment. Their proceedings are by a petitions process, ours by a writ.

Tenants in Common may sue seperately to recover their lands, if one sues his fellow Tenant, he recovers a right to be put in possession; if he sues a stranger the stranger will be ejected, & the Plff put in possession of the whole.

The mode of levying executions in some of the States, is to consider the lands as chattles & to sell them at vendue. This is the practice in New Jersey & New York.

The Act of Bankruptcy affects lands. They go into the hands of the assignees from the time of the Act of bankruptcy committed. The assignees may sell the lands & ~~bring~~ bring actions concerning them.

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Trespass.

There is no such thing in Com as title by prescription or forfeiture, & perhaps not one by occupancy. However there is one case which our Stat does not provide for. Viz When A grants to B for the life of C, & B dies during the life of C. By the Com Law it was open to the first occupant. Nothing is mentioned concerning it by our Stat, but most probably our construction would be agreeable to the Stat of Chs which gives it to the Ex of the grantee.

We now proceed to treat of some of the injuries to real property.

And first of Trespass, which is defined to be a wrongful entry on the lands of another without his consent; — but this is an imperfect definition, as possession is the very gist of the action.

An actual possession in fee is necessary to sustain trespass, tho' not an actual

Tho' mere ownership is sufficient, if there is no adverse possession. All rightful possessions therefore may maintain this action. 2 Rolle 551.

Tenants at Will & Sufferance cannot bring this action against any but strangers, unless the owner invade property they have a peculiar interest in, as Emblements.

A Disseisor may bring trespass.

A Disseisor will be answerable to the owner in trespass to recover the mesne profits, & trespass is brought in such a case in Com, the damages are recovered here on ejectment. A mere intruding possession furnishes no ground to support trespass. 2 Rolle 550. 553. Co Lit 257.

A question arises about which the authorities are different. Can a disseisee sue strangers who commit waste, when the land was in the hands of the disseisor. P. Reeve apprehends the rule ought to be, if the disseisee has recovered out of them, that the disseisee cannot sue them, if he has not, he ought to be allowed to sue the strangers. 2 Rolle 554. Moor 46. 11 Co 51. Powell

An action of trespass will lie against lessees, except lessees at will. Co Lit 57.

Parting with the possession does not take away the right of action. 2 Rolle 564.

In an action of trespass brought by disseisee against a stranger, the stranger cannot defend himself by pleading the disseisees want of title.

But in an action brought by the disseisee against the Disseisee, the disseisee may set up his title either by pleading the general issue not guilty, or by pleading his title specially.

There are a great variety of cases in which the Deft. in an action of trespass may justify. For example. If the Deft entered upon the Plfts land to pay money. Or if the Plft gave a licence. In these cases the Deft is said to justify the trespass

If however a person enters upon the land of another under a licence from the owner, & abuses the licence by doing acts not warranted by it, Trespass does not lie for the acts not warranted by it; but the proper remedy is by an action of Trespass on the case. 8 Co 146. Sty 851. 1 Ven 579.

There may be licences implied from the act of the party. As suppose A sells B wood, here the law implies a licence for B to go on A's land to get the wood if necessary.

So too there may be a licence from implication of Law. As suppose you owe money the law implies a licence for you to enter the creditors land to pay it.

When a licence implied by law is abused, the person abusing the licence is a trespasser ab initio. As if one enters an Inn & proceeds to destroy the furniture, he is a trespasser ab initio, for the law presumes he entered with that intent.

To constitute a trespass there must be a Misfeasance; a mere non feasance does not constitute a trespass. If therefore a person refuses to pay the Inn keeper, this is a non feasance, & the proper remedy is by an action on the case.

If an officer makes no return of a writ under which he has acted, he is a trespasser. This is said to be an exception to the above rule.

Judge Reeves conceives that it is inaccurate to consider it as an exception; for the trespassing act was the taking of the person, or goods, and if there was no return of the writ, there was in contemplation of law no power under which he acted, & for that reason he is considered as a trespasser.

A practice has obtained in this state contrary to the Com Law, of considering a refusal of bail, by the officer, or mesne process, to be an offence, the proper remedy for which is trespass upon the case. If you consider this in one point of view, the decision is according to the Com Law rules: for the mere refusal of bail is a non feasance. But if you consider the officer as putting a man in prison when he ought to have taken bail, there is a positive act of violence, or misfeasance, & the remedy should be trespass ~~upon the case~~ vi et armis.

When a person do a lawful act, from which flows some consequential injury, trespass upon the case is the proper action. Reeve thinks it is inaccurate to ~~call~~ confine an action ~~founded~~ of trespass upon the case for consequential damages to lawful actions; he conceives the rule is the same whether the action was lawful or unlawful, for it is the injury being immediate, a consequential that determines the nature of the action, & that only. Stra 634. Ray 399.

It is said that trespass does not lie for breaking open a house in the night season, for it is a crime, & wherever there is a crime, the private injury is merged. The doctrine of merger arises in this way:- Felony works a forfeiture of all the felons property, consequently as nothing can be recovered by a private suit, the private injury shall be merged in the public offence. But in lay if the person was acquitted on the prosecution for burglary, he clearly might be sued in trespass for the private injury.

And in this Country where felony makes no forfeiture, there might be a recovery in trespass even tho there had been a conviction. 2 Rolle 557.

If a persons cattle breaks into another's close, when the fence is bad, the owner of them may without committing trespass enter & drive them out. 2 Rolle 565

If a person is suspected of having stolen goods, search may be made under a Search warrant; But this search warrant cannot be general. If the goods are not found it is trespass, even with the warrant. 2 Will 283.

The idea of a mans house being his Castle is so rigidly adhered to in law, that a woman was held guilty of trespass for entering against the owners consent, tho' she had a daughter dangerously ill. 2 Rolle 552.

The trespass need not be designed, tho' the action from which the trespass results must be voluntary. A Lunatic is answerable for trespasses, & so is an infant if he has property. 2 Rolle 546.

When a mans cattle trespass, there are two remedies, one by impounding, & the other of the owner upon a fiction of law that he entered with his cattle.

If the cattle are impounded, & the parties disagree as to the damages, the owner may take out his cattle by a writ of replevin. In this writ he gives bonds to pay whatever damages the Magistrate shall assess. The writ then goes before the Magistrate, & the question is what damages were committed, if the ow replevying pays then is an end of it; if not the bond may be sued.

Trespass lies against all those who were aiding & assisting the person who committed the trespass: Also against all who assent to it on accounts of some benefit received. Then can see the accessories in trespass.

Our Stat makes an alteration in the Com Law in cases of trespass committed on wood by adding a penalty. The action of trespass for falling trees must of course be brought on the Stat to recover the penalty. Yet this Stat our Courts have given this construction by that it does not extend to those cases where the trees were cut down by mistake.

Must suppose a person, under the idea he was cutting on his own land, cuts his neighbours trees, will the action which is brought against him serve for a prosecution in trespass on the Com Law? It has been determined that it will.

The Stat also adds a penalty to the Com Law for setting fire to lands; on which clause it has been determined, that if any one sets fire to land, which fire runs on his neighbours, he is liable a not to the penalty, according as his conduct was judicious or otherwise.

& The Stat further provides, that if any one will swear he suspects another of cutting down trees, he shall recover against him, unless he will acquit himself under oath; in which case he shall recover of the Plff double costs; this is a mere Stat proceeding, not warranted on Com Law Principles.

The Stat further provides, that in any trespass brought before an Assistant or Justice of the peace, if the Deft shall justify & demur a record shall be made of this court & this ousts the Justice of his Jurisdiction. The party thus pleading shall be bound in a bond of £20. to prosecute up the plaintiff to the next court of Common Pleas for which purpose no other proof is entered into than the pleadings before the Justice. The bond is given to make him prosecute that speedy, if he does not make out his title, he must pay treble damages, & costs.

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Ejectment.

The Connecticut writ of Ejectment is different from the Eng: But in most of the States the Eng mode prevails.

In Con the action is brought to recover the land itself & damages & Costs. It is necessary to state that you was well seised of the land, which must be described; that the Deft dispseised the Pltff & still keeps him out of possession. The exact time when dispseised need not be stated.

This action of Ejectment is a specific remedy, for the Execution goes to turning out, not only the Deft, but all others who are on the land.

This action in Con concludes the title, not only between the parties, but all others claiming under them.

The Eng action of Ejectment tries the title to the land, & has taken the place of the long & tedious actions which formerly were in use there.

Ejectment formerly was brought to recover a term for years only – In the first place only damages could be recovered, afterwards both damages & the land were recovered.

But now under the idea of ~~trying~~ recovering the term, by a string of fictions the title to the land is tried. Originally this was all a real process, for the owner of the land if dispseised, leased the land to one B for instance, B staid on the land till turned off by the dispseisor, then B would bring this action to recover the term from the dispseisor. If the Dispseisor would not turn the lessee off, in which case the owner would prosecute a stranger to do it, he will then sue the stranger, & if he recovers against him, the execution turns out all who are in. But, perhaps the Dispseisor never had notice, the stranger therefore would write a friendly letter informing him of the suit, the Dispseisor would then come to court, & pray to be made Deft. – But this proceeding is now all fiction, the lessee states that he had a lease, that he entered under it, & is now ejected by the stranger. The stranger then writes the Dispseisor, notifying him of the suit who is permitted to be made Deft.

provided he will compy leave entry & oust the
But if the court order the lessee name
to be struck out, & the Dfs issues to be put in, & if a
recovery is had the lessee is put out of possession, in
which case the mere profits may be recovered in
an action of trespass. The practice now is to
bring the action in the true owners name.
This remedy will not apply when the disseisor has
been in possession more than 20 years.

Many of our lawyers in Con have contended
that a writ of right might be brought in Con, after
15 years in possession. But it is now determined
otherwise. Our Stat declaring the right of entry
shall be lost after 15 years quiet possession is made;
this is in the very terms of the Eng Stat James 2nd
But Contrary to the Eng decisions our courts have
determined that 15 years possession gives a title to the
land. What if such a possession has been a disposs-
ted one? It is clear it must be an adverse one.
If a poor man is permitted to enter on your lands, &
build with your consent, 15 years will not give him
a title, tho' this has been contended.
It is difficult to say on what facts such a possession
on unenclosed lands, for it is difficult to determine
whether the person meant to trespass or to take
possession, & there may be several who claim such a
possession at the same time. The true criterion
is, when the act done, is such a one as cannot be
done by any other one, & the person so doing holds it 15
years by an adverse possession, it will convey the title.
Enclosure then appears to be necessary to gain this
possession, tho a few decisions have been in favour
of the possessor, under strong circumstances when there
is no enclosure.

When the parties have acted under an mis-
apprehension no length of time will gain this right.
15 years possession by the Mortgagee is conclusive
of his right in Con, but if it was ever challenged to be
a mortgage in that time it will be so considered.

Waste.

Waste, vastum, is a spoil or destruction in houses, gardens, trees, or other corporal hereditaments, to the disinherison of him that hath the remainder or reversion in fee simple or fee tail. 2 Blk 281. 3 Blk 223. Co Lit 53.

A person who holds an estate for life or years & does acts which in a stranger would amount to trespass is guilty of waste.

At Com Law none were liable for waste but tenants by the curtesy, Dower & guardians. Tenants for life were not liable for waste for the lessor might restrain them by covenants, & so also was the case with tenants for years, i.e. when they were made so by express agreement. They were however made liable by Stat 6 Ed 1st.

This action originally was but another name for trespass. It could not be called trespass however for the owner was not in possession of the land. The Stat 6 Ed 1st added penalties for waste. Treble damages & the thing wasted were recovered.

In Con we sustain the action of waste tho' treble damages are not recovered.

Waste is either voluntary or permissive.

Voluntary waste is when it is committed by the tenant himself, or by his command, or by people in his employ.

Permissive waste is when the thing is wasted by neglect or by strangers, & it goes on the ground that the tenant allowed of it.

The subjects of waste are houses, lands & woods.

Whoever pulls down a house is guilty of waste, so also is he who permits it to go to decay, for it is the tenants business to keep it in repair.

A Tenant may guard against waste in his contract.

The tenant is not punishable for waste committed by the act of God, or inevitable accidents or the open enemies of the land; but he is bound to repair in all cases. Co Lit 53: 2 Rolle 815. 816. 817: 4 Coke 63.

It is a principle in waste, & one which is by is strictly adhered to, that the tenant must make no alteration in the thing demised. As should a tenant alter a house for the better or pull it down & build a new one it is waste, this would be rejected in Con. Hob 234. Co Ft 182. 1 Mod 94.

If a tenant suffers fences to become ruinous, & walls to tumble down, he is liable for waste. Mon 69.

Neither must the land be changed; therefore turning meadow into plough land is waste, and this altho' the change is for the better. Co Lit 53. 2 Roll 815.

If a mine is open on land the lessee may work it, but he cannot dig for a new one unless so covenanted. 5 Co 12. 2 Mod 193.

Every tenant has a right to wood enough to burn & to make instruments of husbandry. But no tenant has a right to cut timber nor excepting for the purpose of repair, & in doing this he must act reasonably. And he never is allowed to cut green wood if there is any dry that will answer his purpose.

The tenant is bound to repair tho' there are no timber trees on the land. But where there are timber trees he cannot sell them to repair with the avails of the ~~said~~ sale.

A Tenant may take timber trees that are dead for fuel.

A Tenant is guilty of waste if he cuts down trees that were planted for ~~fuel~~ ornaments. 2 Roll 823.

It has been decided in Con that a Tenant in Dower may cut timber trees to a certain extent. Cornwell Case.

It is a rule that the immediate reversioner must bring the action of waste. Co Ft 608.

A Tenant in fee simple cannot commit waste. Neither can a tenant in tail, for his reversion is too remote. A Tenant at will cannot commit waste. Co Lit 69. 10 Coke 139.

The property on which the waste is committed is forfeited to the owner, & if the waste extends over the whole land the whole is forfeited. Co Lit 53 a.

If a stranger cuts down trees from the tenament, the owner can sue the stranger in an action of trover; tho' this is objected to in Co Lit. The elementary writers lay down the rule that he may sustain trover.

Powers of Chancery over Waste.

Chancery by issuing an injunction can prevent waste from being committed. And an injunction will be issued if there is a probability of Wastes being committed.

It is a rule in Chancery to grant injunctions to stay waste whenever an action of waste will lie at Com Law, & they also grant injunctions in many instances where no action would lie at Com Law.

The tenant can only be prevented from committing waste by Chancery, for Chancery considers him as not having any beneficial interest in the estate.

Also tenant in tail after possibility of issue extinct will be prevented by Chancery from committing waste. 2 Show Eq.

By a technical rule an action for waste must be brought by the immediate man. Thus when an estate is granted to A for life years, to B for life, & to C ~~for year~~ in fee, if A commits waste no action at Law can be brought against him, for B has not a fee & C is not the immediate remainder man. Chancery in this case will grant an injunction. Co Lit 289. ~~note~~ 218. 1 Ven 554.

In case of an unborn infant on a bill filed by his friend Ch will grant an injunction against the tenants committing waste. 1 Vern 555. 2 Ven 711.

There is no instance where Chy will grant an injunction against a tenant in Tail, in favour of the remainder Man in Tail. Talb Ch 16.

Generally no injunction will be granted against a tenant without impeachment of waste. 10 W 528. 1 Ja 56. 1 Ven 23.

To the above rule there are exceptions, tho' no action will lie at law — as should the waste be committed out of malice, or extraordinarily Chy will grant an injunction. 2 Ven 711. 10 W 528.

When an attempt is made to destroy orna=
mental things, as ornamental trees, walks &c Chy
will grant an injunction. 3 Atk 217. 1 Ves 265
Ambler 107. 2 Br Ch 89.

If a tenant without impeachment of waste
cuts timber before it has arrived to its growth Chy
will grant an injunction. 2 Vez 511. 3 Br Ch 549.
565. If a mortgagee commits waste no action at
Law will lie, but Chy will interpose provided the
Mortgage is a sufficient security for the Debt.
If not he may commit waste. 1 Atk 161.

Nuisance

Nuisance is defined to be whatever annoys another's property.

There are two sorts of nuisances. 1st Public.

2 Private.

A private nuisance is an injury done to the property of an individual.

Public or Common nuisances are such as annoy the public. Such as Stopping high ways &c

A public nuisance is a crime, yet no action can be brought by any private person unless he has sustained some special damage.

Nuisances both public & private may be abated by persons in their private capacities.

9 Co 55: 5 Co 101.

In destroying nuisances care must be taken not to raise a riot. In the County of Norwich 150 persons were engaged in destroying a house; but they were acquitted, for the house was proved to be a nuisance.

The action for a nuisance is an action on the case. If a man builds his house so near his neighbours, as that the eves run on his neighbours house he is guilty of a nuisance. 5 Co 101.

Darkening a neighbours antient lights is a nuisance - ie if the house had stood there a long time: It is not necessary however that it should have stood there immemorially. If course a nuisance of this nature might be raised in this Country.

9 Co 58. Co R 188. SM 459.

All trades which cause ill smells, or break peoples rest, are nuisances. Of this description are Tallow Chandlers Shops. & 9 Co 59: Co Ca 510. Hutton 136. It is not a nuisance to stop one's prospect.

9 Co 58. A nuisance may be committed on a persons land. As damming water so as to overflow another land. Turning water from its antient course; Building a Mill so that another Mill is prevented from going; These are nuisances to the person who

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has obtained a stream by occupancy.

A person may build a Mill above another provided the water is not diverted from its antient channel, 9 Co 59. 2 Rolle 141.

A spring which arises on the land of another, cannot be altered in its course by the owner of the land; for it gives encouragement to others to build Mills, dispose of farms, Water Castle &c 2 Rolle 140.

It is a nuisance to corrupt the stream by erecting any loathsome works thereon, as Tan works.

In actions founded on nuisances, all the damages are not recovered in one action, for injuries that have not yet arisen as for what may happen as in Trespass; but a right is acquired to a new action by every continuance. 1 Rolle 107. 6 H 402.

If Any Offence which is against good morals or as it is expressed in law is contra bonos mores is a subject of criminal prosecution provided it be of a a die always heinous. But from this it must not be understood that simple lying, or imposition &c &c.

An information was granted against an Attorney for drawing instruments for a transaction contra bonos mores knowing it to be such. 3 Burr 1439.

A gentleman was once fined 2000 marks for exposing himself naked in the public streets. 1 Sid 168. 4 Blk Cr 64.

The Mayor of the City of N.Y. De Witt Clinton at the general sessions in Feby. 1805 charged the jury to find a number of men guilty for willfully & maliciously killing a horse.

It has been ~~[illegible]~~ decided in the Court of Oyer & terminer of this State that a man was liable to punishment criminally for willfully poisoning pigs. In the case of Mr. M'Clain.

Mr. Dallas' reports there are a number of cases cited which confirm this doctrine. As poisoning of chickens, cheating with false dice, fraudulently tearing a promissory note & many others of a similar description. Killing a dog, breaking windows by throwing stones at them, tho a sufficient number of persons were not assembled to make it a riot. Ex M'Lane C.J. R vs Fisher 1 Dall 335 12 Mod. R. 337.

Public Wrongs

(1) A great part of the English criminal Law does not apply in this country. Such only as refers to this country will be noted upon in these Lectures. In order to the punishment of a crime, there must have been one committed. An intention to commit a crime, which was not carried into execution will not subject to punishment.

It is a general rule that Lunatics, & a certain class of infants cannot commit crimes. Yet ~~certain~~ one class of Lunatics viz Drunkards may, & are as much answerable for them as tho' sober. But if the lunacy is permanent, tho' brought on by intemperance, it is an excuse.

Many crimes depend upon the malice, & if in such cases an act is committed, where there was no malice it is an excuse.

The meaning of the word Malice is not the same in law as is understood by it in common conversation. In the common acceptation of the word malice means ill will; but in its legal sense more is comprised. If the motive was a bad one it is malice in Law. If a man murders another for money, it is legal malice. Such a temper as shows a man to be intent on mischief, & that mankind are not safe while he enjoys his liberty, is said to be malicious in a legal sense.

A Felony according to the Eng Law is an offence for which a man forfeits his goods & chattles, & this is generally a capital offence; but men may be put to death without committing a felony. Petit Larceny & Heresy are or have been capital in Eng, yet they are not felonies; so also Rape. In this country the same offences are accounted felonies which subject men to forfeitures of goods & chattles in Eng. But in this country when felony is used, no forfeiture is meant.

When felonies are mentioned in Eng Statutes they are always understood to be capital unless it is stated otherwise.

1895

(1) April Sittings 1804 The People vs Bowerson.

The Justice Court. — If you do not think the person guilty of burglary you may find him guilty of grand larceny. To be in the night season, it must be after twilight in the evening & before twilight in the morning.

Burglary

Burglary is the same in this Country as in England. It is an offence at Common Law, & punished by it is by with death, neither is it allowed the benefit of Clergy; it is also a felony.

B. Con we have not defined felony, only stated the punishment.

Burglary is the breaking & entering of a mansion house, in the night season, with an intent to commit a felony.

By by it is said to be Burglary to enter a church; because says Lord Coke it is the mansion house of God.

From the above definition it appears that it is not necessary that a felony should be committed, a bare intent is sufficient. It does not aggravate the crime if he does commit a felony.

"Night season" according to the old English ideas, included the time from sun set to sun rise. Now it is understood to mean that part of the four & twenty hours when it is so dark that you cannot discern a man distinctly. If it is moon light it is still burglary. Moor 660. C Pl 563. 9 Co 66. (1)

"Breaking" This is not that species of breaking which the law means when it speaks of breaking a close, for if a man enters a house thro' a door, window, or hole that is open, it is not burglary. But if they were closed & he opens them, it is burglary.

So if a man enters in the day time, & goes out at night, without breaking, it is not burglary. But if he enters & opens a latch in the day time, & out at night, Judge N thinks it would be burglary. By an by Stat, which Judge Reeves supposes to be only declaratory, it is made burglary.

Descending a chimney would be burglary.

If a man makes an attack upon a house, & the owner opens it, & the thief enters with an intent to commit a felony, it has been decided to be burglary: but to this rule there are contradictory authorities.

If a man procures a door to be opened by fraud, as by saying that he is a friend when asked his name, it is burglary. Foss Crown Law 108. Kelling 67. 63. 52. Hutton 20. 6 Ch 65. 225.

"Entering" Many things that would not strike the mind as such have been so decided. as putting one foot over the threshold; putting an instrument in a house tho his hand was not in, but if the window was open or broke it is not burglary. Turning a key to unlock a door has been decided to be an entry for the end of the key was in; — When some crate others rotted, they are all held liable for the burglary. Kelling 111. Foss 305.

A servant who is within & opens to one without for the purpose of allowing him to commit a burglary, is ~~[illegible]~~ also guilty. Hale 881.

"Mansion house" In by they consider all the out houses as appendages to the house if in the curtilage, or some enclosure. Entering them may be burglary. Breaking a house without the curtilage is not burglary. Kelling 27. 52. 82.

By Con by Stat it is burglary to break Stores with goods in them, whether it is inhabited or not, stand where it may. Under this Stat any thing is considered as Merchandize that is exposed for sale; even copper slaves provided they are for sale.

"Intent to Commit a felony" An intent to commit any other crime than a felony is not burglary. If a man breaks & enters the presumption is against him.

Arson.

This in Eng is a capital offence, without benefit of Clergy. In Con it is capital provided life is endangered.

Arson is the wilful & malicious burning the house of another.

"Wilful & Malicious". It must be intentional & wicked. Accidental burning is not arson. But if a man intends to burn one, & in consequence another is burnt, it is still arson. Plow 475. To constitute arson it is immaterial whether the house is without or within the curtilage. 4 Blk Co 220.

A number of Eng States have extended it to other things, as hay stacks &c.

"The house of another" To burn one's own is not arson. But if he burns another in burning his own it is arson. Co Lit 372. a. 7. 338. East 116. Kelly 29.

If any part burnt it is arson, but an attempt, without any burning is not arson. For a scorching is burning in Law.

In Con we have a Statute upon this subject. Our Stat says, "That if a man burns any house, if life is endangered, it is death, provided the offender was of the age of Sixteen". If no life was endangered, it is otherwise punished.

(1) The right of punishment which is vested in a government is conferred by universal consent, & gives to the state exactly the same power, & no more over all its members, as each individual in a state of nature had over himself & others. 2 Wh 608.

It is not unfrequently a subject of discussion, whether a state has any right to punish an individual with death. It is said in support of the negative that as we had no right in a state of nature to take away our own lives, that we consequently could not confer any such right upon the government. But it should be remembered that each individual surrenders the rights which he has over others as well as those which he has over himself, & as he may in a state of nature in certain circumstances take away the life of another, so the legislature by standing as it were in his stead may inflict this punishment for him. It is not therefore by virtue of any surrender of right over ourselves that a state becomes invested with this power, but by virtue of a surrender of the rights which we possess over others. — It is said however, that altho a state may pass laws inflicting capital punishment for offences Mala in se, yet it cannot for offences that are simply Mala Prohibita for such offences not existing in a state of nature, an individual could not in such a state possess any power of punishing it, and consequently he had no such power to surrender when he became a member of civil society. If however we will advert to the reason on which the natural rights over others are based, we shall find an easy solution of the difficulty. We have the natural right of infringing upon the natural rights of others because it is necessary to preserve ourselves free from molestation. If therefore civil society emerges from a state of nature it becomes

Homicide (1)

Under this head will be treated of murder, manslaughter, & defendendo. The subject is so much blended as not to admit of subdivisions.

The person who is the occasion of accidental death is guilty of no crime. To excuse one from punishment who has killed another; he must not have been in the pursuit of any unlawful act; he must not have intended any bodily harm; & he must have used proper caution. If the act was not lawful, altho there was no intention to injure the deceased, yet it is manslaughter or murder according to the circumstances of the case

It is laid down that if a man is in the prosecution of a felony & kills a man against his will, it is murder; if in prosecution of a trespass it is manslaughter. When a man intended to kill & steal another's hens, & in attempting to shoot a man; it was decided to be murder. But if he had not intended to steal, but only to kill them, it would have been manslaughter. — But if the crime was only malum prohibitum altho a felony; it is not murder.

If there was negligence it is manslaughter as when a man was cutting wood, with an axe which he knew to be loose, & it flew off & killed a child, it was manslaughter.

If a man is pursuing innocent recreations of a manly nature to try skill & manhood, in things which would be useful to mankind; as wrestling, which would strengthen his body; pitching which would be of service to defend himself & country & kills a man, when there was no want of caution, it is only accidental death. If there was a want of caution, it is manslaughter.

If the action is unlawful, & great bodily harm is intended to some person; & death ensues it is murder. As letting a wild bull into a crowd. If a man in striking one person with an intent to kill, kills another thro' accident, it is still murder.

(1) Most if not all the cases ranged under the head of implied malice, will turn upon this single point that the fact hath been attended with circumstances that indicate an heart regardless of social duty & fatally bent on mischief. M'Na 549.

Malice in its legal acceptation imports a wicked mind, wh. includes a circumstance attending the act, that cuts off all excuse. 550.

(2) Necessary owing to the formation of society, that other associations should be formed in order to preserve our natural rights, ~~we shall proceed the same power~~ or to preserve those rights which we become endowed with in consequence of our connection with civil society, we have the same power of conferring upon the legislature the right of punishing aggressions upon them, as we have of punishing those committed in a state of nature.

The thing which a man is doing, must not only be lawful, but it must be done with due caution to ensure if death ensues. If this caution is not used it may be murder or manslaughter according to the circumstances of the case. If for instance, a master or school master, whips with an improper instrument, or excessively, it will be manslaughter. If the instrument was such as to render it highly probable that death would ensue, it is murder.

If workman throw down rubbish from an house, which is struck passed without giving due warning, it may be accidental death, manslaughter or murder, according to the circumstances of the case. — If also a man should in driving a car, kill a child, it may be manslaughter, murder, or accidental death. If he did not see the child, being engaged in idle conversation, it would be manslaughter. — The malus animo makes it murder: the want of attention manslaughter. (1)

A person found a pistol, & takes the ramrod to ascertain whether it was loaded; & afterwards snapped it several times, & finally killed his wife; this was determined to be manslaughter; but it has been much condemned.

A man was invited with his wife to dine, he took his gun to shoot ducks, he afterwards unloaded it, the boys loaded it, & he in showing it to his wife, killed her. Foster determined that it was not manslaughter, for there was no want of attention.

There are cases which do not come under the head of malus animo yet it is reasonable that they be punished with death.

If for instance, an officer arrests a man, & the prisoner, in endeavouring to escape kills him, & under such circumstances as it was no intention to injure; it is still murder. This is upon the ground of policy.

If a man arrested escapes, the officer may commit murder to recapture him if it cannot be done without; and it would not be considered even manslaughter.

This is true as well in civil as in criminal prosecution.

If a man is not arrested there is a difference between civil & criminal cases that are felonious. Criminal cases that are not felonious, stand upon the same ground as civil.

If an officer in pursuit of a man in civil cases, accidentally kills him, as by pitching a stick thro his legs which throws him down, it is only manslaughter. There being no malus animus. But if he kills him by knocking him down with a large club upon arrest, it is murder; for this act would evince malice.

But if the person pursued was accused of a felony, the officer may take him even at the expence of his life if he cannot be taken without.

A private man, the a witness to a felony would not be justified in using the same means as an officer.

There are two kinds of manslaughter — Voluntary — & Involuntary.

Voluntary manslaughter is divisible into two kinds. One kind is where the act was voluntary. The other is where the killing was voluntary.

Involuntary manslaughter happens when the act was not intended; but the killing happened in the pursuit of an unlawful act. As if a man kills another in shooting ~~a person~~ fowls which do not belong to him. So also when the killing happened in the pursuit of a lawful act, but when due caution was not exercised.

Voluntary manslaughter of the second class, is when the killing was voluntary, must happen in a sudden quarrel, when there is great heat of blood, & a heinous provocation. If the passion was without a cause, it is no excuse. If however there is any time for deliberation, a provocation will not ameliorate the act into manslaughter.

Words, or Jestures considered in themselves, without any preceding act, form no justification in any case.

In this case no malus animus is discovered, but only an intention to curb insolence.

The law does not justify a man in striking another, if he does he is guilty of manslaughter.

If a man assaults another & beats him, & the one assaulted kills him instantly, it may be se defendendo, or manslaughter.

If the assault was for the purpose of committing a robbery, & the killing was ~~instantaneous~~ in defence, it is se defendendo.

If a robber is killed to preserve goods it is se defendendo.

Every man has a right to defend his person, property, & habitation, & is not obliged to retreat; if he kills in their defence it is se defendendo.

But if the killing was after the act was committed, & the provocation was heinous it may be manslaughter.

There is a distinction between slight & great provocations. If the provocation was slight it will not justify. Indeed in all cases the malus animus must be considered.

A boy robbed an orchard; the owner caught & whipped him but not grievously, the boy died thro accident; It was adjudged to be manslaughter.

But in another case, where a boy was caught committing a trespass, & belabored with an improper instrument, it was adjudged murder; for the provocation was slight. —

So also where a boy was tied to a horse tail to punish him for a trespass.

But when a soldier killed a camp woman upon a previous provocation it was adjudged manslaughter.

It was likewise decided to be manslaughter when a father went a mile to revenge a battery upon his child, & killed the boy who committed it by previously beating him.

In most cases an intention to kill is murder; but the circumstances may be such as to make it manslaughter, or se defendendo.

Altho' words alone will not excuse killing, yet if a fight ensued, & the one first injured kills with a brick bat, it is only manslaughter.

In all cases, if there is time to cool, let the provocation be what it may, it will be murder. If for instance a man finds another in bed with his wife & kills him, it is only manslaughter; but if he kills him afterwards it is murder.

The English law holds duelling to be murder if death ensued.

In by the punishment of manslaughter is all kinds is the forfeiture of goods & chattles, & branding with the letter M. — In Con Voluntary manslaughter when there is an intention to kill is punished with forfeiture, branding, corporal punishment, & disability from giving evidence.

Se defendendo is in law of two kinds. One sort is wholly justified then as well as now. The other is entitled excusable homicide & is punished in law with a forfeiture of goods & chattles. In Com we have no forfeitures excepting such as the Stat enacts.

Excusable homicide is otherwise called Chance medly.

When a man kills another in opposing force to force, he is not answerable in any degree. In other cases he must retreat as far as he can without endangering his life.

When a man is attempting a known felony upon the person, habitation, or property of another, & uses force to resist endeavours to oppress him, he may be killed justifiably. But if he can be taken & bound safely he may not be bound. If a man holds a club over another in the act of beating; or attempts to burn his house; or to rob him &c force may be opposed to force with safety. But if a man is only going to offer an insult; or to do an injury which would not be attended with a felonious intention; killing would at best be but manslaughter.

A woman in defence of her chastity may commit homicide & be justified. For this is not a felony. It is not every felony that allows a killing, but when you cannot defend your property without; & then it is justifiable.

A man is not allowed to kill another in defence of his property from a trespass, or to exclude a trespasser.

When a number of men were together in a room, & others broke in without attempting any further violence, or any thing like a felony, some of the company killed one of the intruders; it was adjudged se defendendo. Judge N. think however there must have been a beating &c

When there has been a sudden affray, some retreats as far as he can, and finds it necessary to kill his antagonist to preserve his own life, he will be judged se defendendo. It is immaterial in this case which began.

If two are fighting on a sudden affray, one kills, it is manslaughter.

In every case of killing the presumption is that it is murder, & the prisoner must excuse himself.

Under an indictment for manslaughter murder cannot be found. But ~~must~~ usually the contrary can; excepting when the same court cannot try manslaughter.

When officers are in pursuit of men they are not obliged to retreat.

In case of riots officers must give notice to the rioters that they are officers, & command them to disperse. Private persons are entitled to interfere if they give notice of their friendly intention.

If the warrant with which a person goes is good upon the face of it, he is justified. If an officer should hang a man with a warrant that appeared good on the face of it, he would be justified.

If an officer in his process transgresses the law, he does not stand upon a better footing than any other person.

An officer can do many things more than private persons; but there are things that they cannot do. They cannot break outer doors in levying an execution. In ~~public~~ prosecution for criminal offences, outer doors may be broken.

There have been cases when jailors have been found guilty of murder for improper treatment of the prisoners. As for putting them into a place infected with the small pox against their solicitation.

If a person who has been previously injured, lingers longer than a year & a day, it is in no case murder. If within that time, it may be murder according to the circumstances of the case.

There is a case which is called Tuley's case, that has been much disputed — it was as follows. A Constable went out of his limits & took a woman whom he supposed was a vile character, & put her into the round house. She was in truth a virtuous woman. 2 & twenty of her relations the injury, rescued the Constable, & drew their swords upon him. They then left him. Afterwards they caught & killed him. This was adjudged manslaughter. Jd N. thinks it was murder.

It is agreed that in manslaughter there can be no accessories.

The following authorities comprise the law upon this subject. 1 Hale PC from 300 to 130. Relying under the head of Murder or homicide. Hale PC 270 to 476. Cro Ch 131. Palmer 545. Stra 499. 12 Co 87. Cro Jas 296. Dalt 1498. 1493. 1489. Stra 773. Cro Car 371. Cro Jas 194. 5 Co 93 Comp 1. 1 Salk 79. 6 Mod 172. Dalt 1028. Stra 856.

(1) Also it seems to be generally agreed that any one who has the bare charge or the special use of goods, but not the possession of them; as a shepherd who tends upon my sheep, or a butler who takes care of my silver, or a servant who keeps the key to my chamber, or a guest who sees a piece of plate set before him in an Inn, may be guilty of felony, in fraudulently taking them away; for in these cases the goods may as properly come under the word 'bailed': the injury to the owner being as great, & the fraud as secret, & the villany more base, than if it had been done by a stranger. 1 Hawkins P. C. of the Crown 209.

And in general when the property is made for a special & particular purpose, the possession is still supposed & reside remained with, in the first proprietor. Therefore when a master delivers goods to his servant to carry to a customer, but instead of so doing the servant takes them on the way, to his own use, it is a felonious taking; for the master had a right to countermand the delivery of them, & therefore the possession remained in him at the time of the conversion. Id 209.

So also if a watch maker steal a watch delivered to him to clean; or if one steal cloth deld. for the purpose of being washed; or goods in a chest delivered to keep; or pieces delivered for the purpose of being changed into half pieces; or a watch delivered for the purpose of being pawned: in all these cases, the goods taken have been thought to remain in the possession of the proprietor, & the taking them away held felony. Id 210.

It is to be observed that all felony includes trespass, & that every indictment of larceny must have the word feloniously took as well as the words carried away; from whence it follows, that if the party be guilty of any (see 1261)

Larceny

This includes the several kinds of stealing. Petit larceny differs in no respect from grand larceny only in the small sum of the sum. Twelve pence or under makes petit larceny.

In Eng there is no distinction between petit & grand larceny.

Very small thefts are in Eng punished by the Justices by whipping, others are punished by the county court, & others by the Superior Court. Thefts of considerable magnitude are punished by imprisonment in Newgate.

Mixed larceny is the taking from a man's person or house.

In Eng a difference is made between taking from the person, & elsewhere; but not from the house. Simple larceny is the felonious taking & carrying away of the goods of another; not however from the person or house of another; but if fear was not excited in taking from the person of another, it is still simple larceny.

"felonious taking" means the taking wrongfully or wrongly. Finding & embezzling is not simple larceny; but this is an offence next to this. — If a person is lawfully possessed of property of another & wrongfully takes them; as a factor; carrier &c common carrier; mechanic &c It is still an offence tho not larceny.

But if a watch was given to a gold smith to clean it is not theft to take it.

If a carrier takes a part of the goods & delivers the residue, it is theft; but it is not theft to take the whole. In this case it is said by way of distinction, that he was entrusted with the whole, but not with a part of the whole.

When a man has merely the overseeing of property, as is the case with a steward; or a domestic servant; provided there was nothing to be done about it, it is theft to take it. It is said that there is a trespass in acquiring it. (1)

trespass in taking the goods, he cannot be guilty of felony in carrying them away. 208.

And upon this ground it has been determined, that one who finds such goods as I have lost, & converts them to his own use animo furandi, is no felon; & a fortiori therefore it must follow, that one who has the actual possession of my goods by my delivery for a special purpose as a carrier who receives them in order to carry them to a certain place, or a taylor who has them in order to make me a suit of clothes; or a friend who is entrusted with them to keep for my use; cannot be said to steal them, by embezzling them afterwards. 208

There appears to be some confusion in point of principle in the before enumerated cases. It is extremely ~~to distinguish~~ difficult to reconcile all of them with principle. For upon a critical attention to them it will be found that many of them can be. It is laid down that a common carrier is not guilty of felony in ~~taking~~ converting the whole of the goods delivered, but that a servant who fraudulently converts goods which has been delivered to him to carry is guilty of a felony. It is to be remarked that the carrier is liable for any fatality ~~attending~~ that may light upon the goods from any other cause than the act of god or the enemies of the land. In consequence of this responsibility he has the right of possession & in consequence of that right may maintain trover against any person depriving him of them. But a servant is liable for nothing but fraud or gross negligence, & cannot maintain any action for the goods taken from him, he therefore has not the right of possession, in the legal sense of the word, for the right of possession is sufficient to ground an action upon. As he has not the legal possession it must remain in the owner & converting them to any other purpose than the terms of the bailment is a taking out of the possession of the owner (see 1263

If a man hires a horse & afterwards concludes to make off with him it is not theft; but if he hired it for that purpose it is.
Leakes Crown Law

When Sharpers obtained money by paid, by means of a ring, it was decided to be theft.

Judge Reeve thinks that the cashier of a bank would be guilty of theft in embezzling the money committed to his care. Kelleyng 35.
1 Hale PC 73. Moor 246. Pop. 84.

"carrying away" The least removal is now held to be a carrying away.

A removal is any taking of property altogether out of the place in which it was in.

"personal goods" From this it appears that it will not be theft to take things that are annexed to the freehold. 1 Mod & G. 1 Vent 187. Stra 1137.

There is a species of personal property the taking of which is not theft, nor any other crime. Viz Dogs & other animals kept for whim & amusement. 7 Co 18.
The English have a stat inflicting a fine for Dog stealing. The fine is 30 £.

"Goods of another". It is not necessary to prove whose they are, the presumption is that they are owned by some person.

Animals of a wild nature, or feræ naturæ cannot be stolen; or rather it is not theft to take them. If property however may be obtained in them that will subject to the pains for taking them as Bees. A man may steal his own goods, provided he takes them with an intention of subjecting another. Cr El 536.

This doctrine includes what the English call mixed larceny.

Pa Law we have abandoned the word larceny & introduced the word theft for every species but robbery.

Our stat gives the injured party treble damages.

The same observations point out the difference between the cases of the taylor, a person who keeps them for my use. And the cases of the shepherd, the ~~butler~~ butler, a servant who keeps the key of my chamber, a priest, for none of them have the right of possession, none of them having the right to maintain trover.

The cases of the watch delivered to be cleaned, the clothes to be washed, & the goods in the chest for the purpose of safe custody; & the primers to be stamped, & seem to stand on the same footing. Hawkins says that in these cases the goods have been thought to remain in the possession of the proprietor. Plainly intimating thereby at least a doubt in his own mind upon the subject. But Blackstone says, that neither in contemplation of law any more than in fact do these goods remain in his possession. The bailees could ~~not~~ in any one of these cases sustain an action were they deprived of them, & they could not do this were not the right of possession in them, & if it is in the bailees it is in no one else for it cannot be in ~~two~~ at the same time.

In this State if a man steals a sum below five shillings he is fineable. If between 5 & 20 fined or whipped. If above twenty fined & whipped. For stealing a horse the punishment is Newgate.

If a man conceals a theft which is not committed by some of his own family, or receives stolen goods knowing it, he is punishable as principle. It is this humane provision of our statute that a man is excused from exposing the shame of his own family; it is not so at Com. Law.

Larceny upon the body - or Robbery

Robbery is the felonious & violent taking of goods of any amount, from the person of another putting him in fear.

"felonious & violent" This commonly means with threat. But if it is done thro' beggery, or any other co-ven, it is still robbery if it puts the man in fear.

When a man was compelled to deliver property not in his possession, it was adjudged robbery. & delivery of property does not purge the offence. If no property is taken it is not robbery, tho it is an enormous breach of the peace. In by Mac is a stat. mention this felony. Hav PC 147. 8.

"from the person" It is not necessary that these words should be strictly complied with. Taking from a mans house; or driving a mans horse from a lot in his presence putting him in fear so that he dare not prevent it; or compelling a man to throw down his money.

If it is not in the presence of a man it is not robbery. 1 Hl. 613. Carth. 145. Hardwick 107. Stra 1015. Dory 197. Com R 478.

"putting in fear" It is enough if it would induce a person of ordinary resolution to fear; whether it did the one robbed or not. It is not necessary to prove that the person was put in fear. J Ray 197

When a man threatened to accuse another

of an infamous crime, if he would not give him money, it is robbery. It is immaterial whether the man has actually committed the Crime or not.

It has been made a question whether compelling a man to sell is robbery by putting in fear?

Larceny without fear does not differ from other larceny.

Perjury

Common law perjury & perjury in this country are the same in most of the States.

At Com Law it was punished by fine, imprisonment & pillory.

"Perjury may be considered a wilful false oath" "It must not be extrajudicial, but in a proceeding in a Course of Justice & to a point material to the question, and lawfully required".

"It must be wilful" This is a point that must be made out. If it was thro' inattention it is not perjury. But he must intend it. 5 Mod 350. 10 Mod 195. 1 Salk 513.

"in a proceeding in a course of justice". It is not necessary that it should be in a Court of justice. By many old authorities it is said that it must be before a court of Justice. But now the books go so far as to say that it is perjury to swear falsely before any person legally authorized, & in a case where it is proper to swear. Cro H 168. 907. 185. bog: 5 Mod 340. Hut 54. 12 Co 104.

Swearing to compel a man to find sureties, provided it is false is perjury. Cro Ch 146. Moor 627.

No private oath, tho he gets a justice to administer it, is perjury. 1 Wms 369. Cro Ll 169. Latch 38. 132. Sir Jos 148.

Officers are not punishable for perjury when they violate oaths for the faithful discharge of their duties. 2 Roll 257.

Whether swearing falsely in ones own case is perjury has been doubted; but it is now held to be perjury.

It has been questioned whether a man can be guilty of perjury in swearing to a fact which is true? But it may be perjury. It is immaterial to the constitution of perjury whether a man is believed or not.

By an Eng Stat swearing falsely is ~~perjury~~ a felony. Pelm 294. 3 Mod 222.

If a man swears in these words - viz. "that he thinks" or "believes" or "to the best of his knowledge" & swears falsely, it is said not to be perjury. Judge Rees thinks it is; for when this principle was established, the ~~[illegible]~~ such testimony had no weight, but now it has, & as the reason has ceased, the rule ought to cease.

It is not perjury for a man to swear falsely ~~Imaticiously~~, provided it is immaterial. It would ~~not~~ however have any effect to impress the mind with a belief that he knows accurately the subject, in order to strengthen what he says truly. Cro El 500. Cro Ch 321. Carth 422. Ld Ray 258.

Our law in general, does not require any particular number of witnesses in general to convict of crimes; but in perjury there must be two at least. 10 Mod 195.

The party losing his cause by perjury cannot be introduced to convict the criminal. Nor can they in forging or using. The thinks however he has met with a case that says the forged instrument can be brought in & cancelled, so also in [illegible]y.

Subordination of perjury is the inducing a person to swear falsely. Yelv 72. Cro Jas 58. Cro Ch 337. 3 Mod 122.

There are many Stats in by making it more penal than at Com Law; mostly however in mercantile transactions. 1 Hawk 325.

By one of the Stats a perjurer or subornor, is punished by a fine of £100 & six months imprisonment. If he cannot pay the fine, he must be fined in the pillory.

The rule with regard to a ~~person~~ party being allowed to testify in a case in which perjury has been committed has been altered ~~[illegible]~~ & only extends to the exclusion of parties while the suit is depending. W Kel 107.

Forjery

Forjery by the Eng Stats has been extended much further than the Com Law. Under this head forjery at Com Law only will be considered.

Whatever would be forjery in the making, would be forjery in altering

At Com Law it was confined in private concerns to Wills & Deeds.

Forjery is the falsely making & altering.

"falsely" altering for a less sum is not forjery for it hurts no body but himself.

There must be an intention to do an injury, or to prevent justice & equity.

The making of writings merely in sport is not forjery. Cro 375. 3 Mod 66. Moor 655. Sho 69.

We have a Stat extending forjery to many more things than were embraced by the Com Law. Besides Deeds of Conveyance & Wills; Testaments Letters of Attorney, Bills &c. In fact any writing the intention of which is to prevent Equity & Justice, it is immaterial whether it does.

Forjery of money & Bills in Eng is felony without benefit of Cl. 77.

In cases of perjury & maim it is now ruled that the party injured is a competent witness, in the case of Forjery he is still incompetent unless the obligee releases the obligor. 2 Salk 282.

But to repel the testimony of a witness, who comes to prove the forjery of his own hand, it must appear that he would be liable to be sued in case the signature was genuine. Mc Nal 122.

Libels

Under this head the private action will not be considered.

In Criminal prosecutions the truth will not justify.

A Libel is defamation expressed in print or in writing, or expressed in signs & pictures, with a design to blacken the reputation of some living or dead person.

There can be no criminal prosecution unless it has a tendency to break the peace.

Under this head will only be considered libels of private persons.

In Com there is a fine for slander, but not by the Com Law. 5 Co 125. 2 Will 403. 2 Burr 980. 1 Ld Ray 421.

There is no wading a criminal prosecution more than a civil. Moor 627. Stra 498.

Truth is no justification. ~~Hob~~ ~~Hob~~ ~~Hob~~ 258 Hobert 253.

Matter which is uttered or published in a legal proceeding is not a criminal libel. The reason of this is, that it might prevent peoples putting charges in proceedings for fear of punishment. But if the object of the suit was to defame & the suit was dropped, it seems there be a criminal libel. 1 Lev 240. 1 Sid 414. —

Slander of this kind will support a civil suit. Kelly 288. Ld Ray 483. 11 Mod 142.

The man who publishes, & the one who procures it to be published are liable. 5 Burr 2656.

It has been once said that the making only of a libel is punishable, tho' not shown to any person. This Judge Ch. does not agree in. But if another publishes it he thinks it is an offence by the maker. 5 Mod 167. 9. Co 59.

It has been made a question whether the publisher, ie the one who dispenses it, is made liable. It has been decided that he is.

It has also been decided that the printer is liable for the libels on his apprentices or journeymen. He thinks however he will not be published criminaliter. Woodfal in Nunn Ld Ray 414. 417. 729.

As to what constitutes publishing there are many obsolete authorities.

The reading of a libel for amusement, Sir Ed says is not a libellous publishing; but if it was thro' any ill will, or *malus animus* it is punishable. 9 Co 59. Moor 813. 1 Vent 31.

The punishment of libellers is a com. Law one. It is fine, corporal punishment, & compelling of securities for good behaviour. Stra 934: 8 Mod 78.

Is a jury compellable to bring in a special verdict in libels? Judge N. thinks that they are. This is the only case when law & fact are entirely distinct. It is the province of the court to find law; & of the Jury to find facts. It has been so decided in Eng. Since however there has been a Stat altering the Com Law in this particular.

Breaches of the Peace.

Under this head will be considered Assault & battery, Mayhem, Affray, Unlawful assemblage, Rout & Riot. Any offence which is more than these is Treason.

Assault & Battery

This happens when there is an attempt to offer violence, or some corporal injury.

Out of this there grows two actions Civil & Criminal.

No words are assaults, tho a person therefor may be compelled to find sureties. 6 Mod 173: 1 Vent 256. A battery differs in nothing from an assault only that it is more aggravated.

To constitute battery, it is necessary that it should be done in an angry, knavish, wrongful & insolent, or wanton manner.

Acts in sport, as tickling &c are not actionable unless injury arises. To make it criminal there must be some mal disposition. Salk 384: 6 Mod 149. Spitting, throwing water &c are batteries.

If a man makes an attempt to strike another, he may make a defence, provided he does it at the time. He must not however proceed further than is necessary for his defence. The Judges however are not particular as to the precise extent of the measures that were necessary for defence; they allow something for the heat of blood raised by the assault. 6 Mod 172. 230. 263. 1 D Kay 177. 2 Salk 642.

Judge Kent thinks that a proof violation of law, furnishes no ground for an increase of civil damages

If a battery is enormous in addition to the fine it is punishable by placing the criminal in the pillory. 8 Mod 285.

2d Affray

If in consequence of an affray, an assault & battery is committed, a prosecution for that offence will lie.

The difference between an affray & is that it is attended with circumstances of affright. It is not necessary that there should be an affright. If the persons are armed with weapons to terrify it is an affray. Quarrelsome words alone will not make an affray.

A private person has a right to part them, & to prevent others from joining, & are guilty of no assault & battery in so doing.

If a dangerous wound has actually been committed, it is the duty of the by standers to assist the offender, & this altho' they have no warrant. If they do not they are liable to fine & imprisonment. They ought to carry such persons to the next justice.

A Constable is bound to arrest, tho there is no wound, & so a Justice, & Sheriff. 2 Roll 78. Cro Ell 375.

A Justice has no power to compel by standers to assist

3 Riots.

A riot is in degree a higher offence than a rout, yet we think it best to begin with a riot.

Three or more persons are necessary to constitute a riot. The Eng have a Statute upon this subject, & so has

A riot is the unlawful assemblage of three or more persons, with an intent when assembled, not after, to assist each other against opposition of a private nature; & must proceed in a tumultuous manner to the terror of the people; & it is immaterial whether it is ~~done~~ the pursuit of a lawful or unlawful ~~manner~~ act, if done in this manner.

If there an indicted & Judgement is rendered agt them

There must appear in the Indictment, that there were three or more.

If one only is indicted the Jury must find that this one with others were guilty. Pop 121. Mon 665.

"With an intent" This will depend upon the circumstances of the cases, which the Jury must for that purpose. 6 Mod 43.

If after the rout they deliberately agreed to go & do an unlawful act, that will be considered a meeting with such an intention.

Joining a riot after it has commenced makes all such persons rioters. 6 Mod 43.

"It must proceed with violence, &c. such a manner as would have a tendency to excite fear." Showing Cannon; or using speaches &c come within the clause.

It is laid down that what would be a trespass in one would be a riot in three. But this is not true; for a trespass may be done secretly. 6 Mod 141. 3 Bur 1263. Hob 91. 1 Hut 3 Bq. 380.

"It must relate to a thing of a private nature" As pulling down houses, fences &c

But if an attempt be made to pull down houses, fences &c generally, or to do mischief till they bring about certain objects, it is treason.

"It is no matter whether the object is lawful or unlawful if it is done in an improper manner."

It is a general idea that the breaking a lock is a high offence. Judge R. thinks that there is nothing in that idea if the purpose is lawful. 1 Mod 3. 2 Show 236.

Swearing the peace.

4. Routs & unlawful Assemblies &c.

All the requisits to a riot, are necessary to constitute a rout; only no part of the intent is accomplished.

An unlawful assembly is when they get together, & there is no motion for the accomplishment; in other respects it is as a riot. Hob 29. Lit. 394. If a man assembles his friends for the purpose of defence, if it is not under circumstances to inspire fear in public, he thinks it is not an unlawful assembly. 11 Mod 16: 3 Ld 91.

If a man swears that he believes his life in danger from another, such person will be bound to keep the peace.

Surety is required for good behaviour for very many offences, as usury, whoring &c. These last are stat regulations. Both here & in Eng this may be done for many offences for which no action will lie; as for spreading false reports &c. A person will not be bound over for one offence but for ~~the~~ obtaining the character. These are seldom demanded.

If a person who is brought to give sureties for good behaviour, or to keep the peace, will not give sureties, he may be committed to Jail.

At Com Law if a man has been security abused, he has no remedy if he cannot prove it. But Com we allow persons to swear in such cases, who have suffered the abuse.

The party injured may always be introduced at Com Law, to swear in public prosecutions for breaches of the peace.

In cases of riots the County & Superior Courts have concurrent jurisdiction.

Buying & Selling a pretended Title.

This was an offence at Com Law. By a pretended title is meant a disputed one; it is of no consequence whether it is a good one or not.

At Com Law it was a matter of no consequence whether the party was in or out of possession, if it was disputed.

Whoever sells a disputed title is guilty of a public offence. Moor 751. Hob 115. Plow 80 & 88.

But if a man is out of possession, he may sell a disputed title to one in & conveyance; for this goes to answer the object intended by the Stat.

A Stat of Hen 8th allowed the one in possession to sell if he had been in a year.

At Com Law it was only punished by fine. An by Stat another ted the punishment, by ordering the Grantor & Grantee should each forfeit the value of the land. Cotton 384.

Our Stat is nearly a copy of the Stat of Richard 2 & Hen 8th. It conforms with the Stat Hen only it does not limit a time; but any person in possession may

Forcible entry & Detainer.

Under this will be considered the civil & criminal injury.

A Stat of Rich 2d enacted against this; it made it a crime to enter forcibly.

If he had a right the civil suit would not lie for damages.

At Com Law it was allowed when a man had a right of entry that he might enter forcibly. The Stat 5 Rich 2 made it criminal for to enter with violence & force.

The party injured has no remedy when there is a right. A forcible detainer is when a man enters lawfully, & detains with the same unlawful violence.

But the one ousted may get possession by going to the magistrates, & they will take a jury to ascertain whether there was a forcible entry & if so the Sheriff must oust them. Under this no bills is tried or damages given.

We have a Stat regulating the manner in this State; If a man is in & owns the title, he is not punishable for a forcible detainer.

Treason

Under the Eng law there are four kinds of treason. 1 Counterfeiting the Coin. 2 Killing certain men high in office. The 3d Relative to the kings own family, as compassing & imagining the kings death. 4. If that which consists in levying war & adhearing to his enemies. This last is all that relates to us.

Foreigners while under the protection of the laws can commit treason as well as subjects.

The case of embassadors is said to vary, & that they must be sent home. They are only said to live near the ~~United States~~ country to which they are sent. Attempting the life of the king however is said to form an exception.

If the inhabitants of one Country in time of peace, invade the Country of a nation, they do not thereby commit treason. 7 Co. 6a Lit 129.

A wife is not compellable to give in testimony against her husband, excepting in the case of treason; nor is she allowed to in any other case excepting when he has been guilty of personally abusing her.

One witness is not enough in treason to convict; there must be two; one to one overt act, & one to another is enough.

The Stat 25 Edw. 3d in Eng identifies treason; It says that it is treason to levey war, & give aid, & comfort to the enemies of the Country.

Levying war. A person who attempts to dethrone the king; or attempts to raise a govt. seperate, tho not to overthrow the existing one, is guilty of treason.

If a person is compelled to join rebels it is

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not treason. But if there is no other compulsion used than a threat to destroy the property of the subject, it is treason for him to engage.

Insurrections to redress what they call grievances, as to reduce the price of property, or to enforce the repeal of laws &c are treasons.

An attempt to destroy one enclosure is only a riot; but to destroy all enclosures is treason.

"Giving aid & comfort". Selling them arms; giving them provisions &c & any thing which enables them to prosecute the war; is what is meant by this. 2 Vent 316. 1 Salk 634. Mon 620.

Of binding over

A man who is entitled to swear the peace is one who fears his life; or of having his house burnt; or of being imprisoned with force. He must have just cause to fear.

It is not on every complaint that the court will bind over. They will take the matter into consideration, & decide as they think proper. 1 Levy 107. 2 H 228. Mon 874.

Every description of persons is entitled to this privilege; aliens & condemned persons as well as others. Husbands & ~~Wife~~ Wives may exercise this right against each other. Hardwick 174. 2 Lev 1207.

It may be demanded against all persons.

When this complaint is made a warrant is issued to bring the person before them.

If the court think proper to attend to the complaint their judgement is that the Deft be imprisoned unless he find sufficient sureties.

It is the practice unless there is a court in session to bring the Deft before a justice; if there is a court in session it is customary to bring the Deft before ~~them~~ it. When the justice binds over

The condition of the bond is that he appear at the next court; if the Pltff does not appear to substantiate his ~~the~~ complaint, he is discharged from his bond, & so if the Pltff does not make out the ground of his complaint to the satisfaction of the court.

If the person bound does break the peace upon sufficient provocation, it is not a forfeiture; nor is every choleric word a breach of the peace. Fighting, challenging &c are breaches of the ~~bond~~ condition of the bond; so also engaging in any unlawful enterprise attended with violence. — But secret crimes whose tendency is not breaches of the peace, as petit larceny.

If the bond is broke it is sued, & the court chancel it down to what is right. The bond however remains with the court in full force. 5 Co 4 498. Co Ll 86. Mod 249.

Every trespass is not a breach of the bond; for secret offences of this nature are not within the purview of the condition.

A particular offence will not induce the court to bind over; but a reputation of offending. as being notoriously a vagabond; or a person of bad fame.

Of Bail

Every State has local regulations upon this subject. Bail in Eq is almost always required by very old Stats.

Before there was any Stat upon the subject, it seems that every offence but homicide was bailable. He would not have be understood that there were no cases of homicide; but generally. Now that there were any offences in which no corpus could bail. In all others Sheriffs, Justices, & Jailers might take bail. At that time it was a matter of right to be bailed. But the Stat of West 1. 3 Ed 1. made much alteration. It took away this power from those men in all cases of treason, arson, Robbery, & all cases of felony when it was confessed, or he was taken with the goods upon him, or in the manner as it is sometimes called; so also in all cases where persons broke prison; & all notorious thieves. Under this Stat it was not a matter of right but they might allow it if they chose. Co Lit 185. Latch 12. 5 Mod 323. 455. 4 Burrow 2179. 1 Salk 203. Stra 2. If the Court are of opinion that the case is a doubtful one, they will usually bail.

Murder has never been bailed only when the person is ill health; or was Respite a time, &c in treason.

These are the leading features of the Eng law. How it is in other states he knows not.

In Con the Shff never bails in criminal cases; but the justice & sometimes the Court, when in Session. Bail is not in Con allowed in accusations of a capital nature, unlys it appears to the court that the accused is innocent. In all other cases it is a matter of right unlys restricted.

A c man could not get bail when committed but could after, the Shff, Judge B - thinks may take it for the amount specified in the commitment by the Justice.

Indictments & Informations

An indictment is a complaint found by a grand Jury. An information is laid in by the prosecuting officer, & there is no trial by the grand Jury upon the subject.

An indictment covers all offences both great & small. The misdeam may however be prosecuted against without an indictment, provided the punishment does not affect life. It is discretionary with the informing officer. It is the usual custom for the officer to have them all indicted. In Lon however, we are not in the practice of calling grand juries only in cases of a capital nature.

When a person indicted under a stat is not proved to have committed an offence agt it but is agt the Com Law, he may be found guilty & the words agt the stat may be rejected as surplusage. 2 Mc Nal 495.

Accessories & principles

There are of two kinds, the one before & the other after the offence.

There are cases however where there can be no accessories viz in Treasons & Trespasses of all kinds as batteries &c. And in forgeries & petit larceny. There can be no ~~[illegible]~~ accessories, but are all principles, as well as in Treason & Trespasses.

All who aid, countenance, & abet, in the above are principles.

But it is said that in batteries there can be no accessories after the fact; as if he countenances & comforts.

Judge B. thinks that the reason why there are no accessories after the fact, is because the presumption is that the one countenancing &c gave a previous assent.

In all cases of burglary those who watch as well as those who perpetrate the deed are principles.

When a man killed another in great heat of blood by an instrument heard by a great enemy

of his opponent, it was decided to be manslaughter in the one way, & murder in the one handing the instrument. Mon 53. or 83: 9 Co 67. Kelly 47 Plow 90.

When men assemble for a particular purpose & one does the act for which they assembled, they are all principles.

Merely standing by an idle spectator does not make a man either principle or accessory.

If a man procured a felony to be committed by advising & encouraging it, & was not or, to near the spot to aid, or assist, he is only an accessory.

A man may be an accessory thro' mistake. When for instance he employs another to do a thing, not of an innocent nature, but will be mischevious.

Trespasses are here understood to include all riotus &c.

With respect to felonies men may be ~~accessories, or~~ accessories, but all who assemble with a felonious intent are principles.

Persons who do not do their duty in an affray, ie private persons are not guilty either as accessories or principles.

But persons who advise to felonies are guilty as accessories, unless the thing was not done by the person intentionally. As if a person should give another poison, he not knowing it, to give to another; or exciting a madman to a felony. In these cases the one delivering, or exciting = the principle. 4 Co 44. 9 Co 81. Kelly 52.

A man who excited & commanded is not the only one who may be accessory, but also the one who encourages it.

If A excited B to murder C, & he kills D thro mistake, A is accessory. But if he did not do it thro' mistake but intentionally, he is not guilty. If a man encourages another to do promiscuous mischief, he is guilty as accessory for what acts ensue. As to burn one house & another is burnt. Plow 475.

With respect to accessories after the fact. Persons who give assistance towards preventing an arrest are of this description. So also are those who rescue the prisoner.

The mere act of giving an offender something to eat, without an intention to assist him to escape, does not make an accessory.

The wife may, without being punishable as an accessory, conceal the husbands felony & assist him to escape. But the husband may not aid the wife; nor can a father a son; nor any other relation by the Com. Law.

If the principle is acquitted or die before conviction, the accessories are not punishable. Nor can an accessory be convicted as such if the principle has been pardoned; tho he may be punished for a misdemeanor. —

A defendant cannot be found guilty on an indictment of him as principal, which only proves him to have been an accessory before the fact; but he ~~may~~ on such evidence, shall be discharged from the indictment. Hg b. McNal

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If one has been convicted, & afterwards more testimony occurs in his favour; he may have a new trial. But a new trial will in no case be granted against him. 4 Co 40.

If a Jury in an indictment for murder return not guilty, he is thereby acquitted both of manslaughter & murder; for the term not guilty embraces both.

If for murdering a man who is afterwards acquitted for the same murder, he may help himself by averring that he is the same.

It has been made a question whether an acquittal of a murder in one county, is an acquittal of the same murder in another county? It is a principle that a man shall not be put in peril twice for the same offence. But in this case he is not put in peril twice for the same offence for it is a rule of law that a prisoner shall be tried in the county where the crime was committed. But this principle will not do in all cases where in horse stealing he is supposed to be constantly stealing it, & may be tried in another county. Co Lit 446.

If the verdict is such, that the Court cannot render Judgement upon it, either when found guilty or innocent.

If a man has been prosecuted for a trespass, & found guilty, & afterwards for a riot; can he be convicted on the second prosecution? Judge R— thinks that wherever there is a prosecution for a set of facts, stating them to be a breach of the peace, & stating nothing that makes them a riot, that it is not such a conviction as will bar an action for a riot. But if the same facts are alledged in both informations, it will be helped out by averments, & will acquit them from the other. But a former conviction ought to mitigate the damages.

If a Justice exceeds his Jurisdiction. As if he decides upon matters that amount to murder or manslaughter, his judgment is no bar to a second prosecution. So also if he should decide upon a riot or a breach of the peace, it is no bar. These have been decided in Connecticut.

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Miscellaneous Rules. ~~[illegible]~~

When the act is in itself unlawful, the proof of justification or excuse lies on the Deft, & in failure thereof the law implies a criminal intent. 4 Tr. 147.

Every conspiracy to injure individuals, or to do acts which are unlawful, or prejudicial to the community is a conspiracy. Journeymen who refuse to work, in consequence of a combination, tho' their wages are raised, may be indicted for a conspiracy. 1 East Hawk 348.

~~A conspiracy~~

1206

Lex Loci

Most of the law upon this subject is adverted to in the 2 of Burrow in the case of Robertson vs Ward; & in the first of Judge Black stone's Reports.

It is a principle of the common Law that crimes are punished where committed. But the injury to persons & persons is transitory, & may be redressed when the offender can be caught.

If there is a difference between the laws of the country where the offence was committed, & where the offender was caught; the damages must be according to the laws of the country where the offence was committed.

If a thing is a trespass in one place, & not in another; & a person is arrested where it is no offence, still he may be recovered against, & according to laws wherein it is an offence.

The law of the place where a contract is made, governs in many cases, but not in all.

When men enter into a contract which has every requisite necessary to make it a contract in that place; still it would not be good in another, if there was a law against certain other qualifications.

Ex. If the law of Ky was such; that for money won at play, & for notes given therefor, could be recovered; & the law of Ohio was such that it could not be recovered, there being a positive law against it; & there was an agreement that it should be performed in Ohio, it would not be enforced. But our lex loci would prevail. — So if there is any positive stat against them, they cannot be enforced. But if there is no law against them; tho' they would not be recovered if given there, still it would prevail.

Judge Nelson thinks, that when there is no moral turpitude in a contract, & the policy of the country is not against them, they will be enforced.

Ex. If by the Policy of the country is against Stock Jobbing, still tho' they are made in another, they will not be enforced. But if the contract does not interfere with the policy of the country it is good.

P. Ch. 128. If by a man give a bond for with 7 P. Ct. interest to a man living in Ireland, on a consideration

Lex Loci continued

which arose in Ireland, & then to be performed. This was decided not to be usury. — Pr. 128.

If an obligation bear no interest, & in some of the States interest could be recovered & in some it could not, & the contract was to be performed where interest could be recovered, the obligee living there, & the consideration existing there, it would carry interest, tho' not where it would not. But otherwise laws of the State say that the suit shall not be maintained.

If the laws of one country require a contract to be stamped, & the contract is made where it is not required, Judge N. thinks it would be supported, & he supposes that the laws of stamps do not contemplate such contracts.

But if two order go out of the Country for the purpose of making a contract to avoid the duty, it would be bad, & not supportable.

If contracts are made respecting lands, the lex loci of the place where the land lies must govern.

If a contract is a legal & fair one, & such a one as would be supported where made; yet if the country where it is sued is of opinion that it is malum in se it will not be supported.

But this is an exception to the general rule.

Sentences of courts of foreign jurisdiction, become lex loci, & are treated in some countries as solemnly as if they were made in the country where considered. This is so in Eng. in some cases. As in Mar. Law & Admiralty Jurisdictions. The others carry prima facie evidence of the right.

All sentences of Divorce have been uniformly treated every where as of full validity every where else.

But cases that are entered by Com. Law only it is not conclusive evidence. But the American constitution has remedied this in the U. S. States.

In Eng. they do not allow the be otherwise foreign. Doug. 1.

When contracts are bad when made, but good when sued, they will not be enforced. Full age in Penn. is 21. If a man of 24 gives a note, infancy is a good plea in bar.

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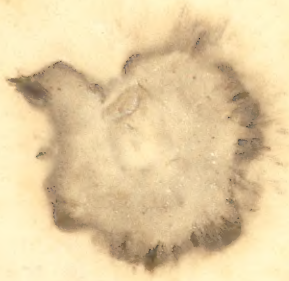

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